Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Dianna Roberts,

Petitioner,

v.

WMC Mortgage Corporation, Bank One, N.A., Fairbanks Capital Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Ninth Circuit held the District Court failed to acquire subject matter jurisdiction because the plaintiff failed to give TILA rescission notice to the assignee. The questions presented are:

1. Whether the Ninth Circuit (in)correctly held, in conflict with the 5th, 7th and 11th circuits that the word creditor, as used in 15 U.S.C.§ 1602(f) means original creditor.

2. If the answer to Question one is no, the following Question: Whether creditor making an assignment, with an interest in real property, must correctly file an assignment into the system of records that provides the correct name and address of the assignee so a party can give notice of recission to an assignee under 15 U.S.C.§ 1635 and Regulation Z § 226.15.

3. If the answer to Question One is no, the following Question: Whether an assignment, with an interest in real property, be made to a National Bank that ceased to operate under that name for one year require any duty to a party seeking to rescind under the TILA.

4. If the answer to Question One is no, the following Question: Whether Oregon State Law, O.R.S. 73.0504(a), controls when a creditor files an assignment, with an interest in real property, that fails to provide correct name

an address by allowing a notice of dishonor when diligence does not enable a party to make said actual rescission due to lack of information.

5. If the answer to Question One is no, the following Question: Whether an assignee, in the form of a Pooling and Service Agreement, can be served a consumer's right to rescind by providing a copy to the Master Service WMC, original creditor, and obligated under that agreement to except documents on behalf of the Trustee, FNBC predecessor to Bank One, to accept said documents.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTES PROVISIONS INVOLVED .. 1

STATEMENT 1

A. Statutory Background 2

B. Factual Background 5

C. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 8

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE MEANING OF WORD CREDITOR IN 15 U.S.C. § 1635 8

A. The Circuits Are Divided Meaning Of The Word Creditor..... 8

B. The Meaning Of Creditor The TILA Is A Recurring Question Of Federal Law On Which Uniformity Is Important..... 11

C. The Ninth Circuit Violated The

Principle Of Statutory Construction
In Allowing That An Assignee
Mandatorily Must Be Provide A
Notice To Rescind Under 15 U.S.C.
§ 1641 (c)..... 14

II. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTING AN ASSIGNMENT WITHOUT THE CORRECT NAME AND ADDRESS... 15

III. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTED AN ASSIGNMENT MADE TO NATIONAL BANK THAT CEASED TO EXIST FOR ONE YEAR..... 19

IV. THE NINTH CIRCUIT ERRED BY NOT ACCEPTING OREGON LAW REMEDIES TO DISHONOR WHEN NO NAME OR ADDRESS IS PROVIDED IN DOCUMENT UNDER EQUITABLE TOLLING AND EQUITABLE TOLLING AND ESTOPPEL AS IT RELATES CONCEALMENT AND THEIR EFFECTS ON THE STATUTE OF LIMITATIONS UNDER TILA..... 21

V. THE NINTH CIRCUIT ERRED WHEN NOT ACCEPTING SERVICE OF NOTICE TO RESCIND ACCORDING TO POOLING AND SERVICE AGREEMENT..... 26

A. Terms of Pooling Agreement
Allow Presentment Of Documents
To Master Servicer WMC,
Original Creditor..... 26

TABLE OF CONTENTS – Continued

Page

B. Oregon Law And Cases In Other Courts Support The Proposition That Notice To Agent Is Notice To Principal..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson Brothers Ford v. Valencia,
452 U.S. 205, 219 (1981) 4

A-Z International v. Phillips,
323 F. 3d 1141, 1145 (9th Cir. 2003).....11, 13, 15, 28, 30

Beach v. Ocwen Fed. Bank,
523 U.S. 410, 419,118 S.Ct. 1408, 1413 (1998)..... 3

Begala v. PNC Bank, Ohio, National Ass'n,
163 F.3d 948, 950 (6th Cir. 1998)..... 5

Bell v. Fowler,
99 F. 3d 262, 266 n.2 (8th Cir. 1996)..... 23

Bonded Royalties Inc. v. Jefferson,
1935 OK 846, 50 P.2d 281, 174 Okla. 345..... 29

Bradley v. United States,
410 U.S. 605, 609 (1973) 14

Caminetti v. United States,
242 U.S. 470, 485 (1917)..... 15

Carroll v. Newcomb,
132 Or. App. 526, 888 P. 2d 1062 (1995) 18

Central Transp. Co. v. Pullman's Palace Car Co.
139 U.S. 24, 11 S.Ct. 478..... 20

TABLE OF AUTHORITIES

Page(s)

Chakonas v. City of Chicago,
42 F. 3d 1132, 1135 (7th Cir. 1994) 22

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) 4, 5, 13

Darling v. Christensen,
166 Or. 17, 25-26, 109 P. 2d 585 (1941)..... 17

Davison v. Bank One Home Loan Services,
2003 WL 124542, at *5 (D. Kan. 2003) 4

Dring v. McDonnell Douglas Corp.,
58 F. 3d 1323, 1328 (8th Cir. 1995) 22

Ellis v. General Motors Acceptance Corp.,
160 F.3d 703, 705-08 (11th Cir. 1998) 11

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 25

Fairley v. Turan-Foley Imports, Inc.,
65 F.3d at 479 (5th Cir. 1995) 10

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555, 559-70 (1980) 4, 10, 13

TABLE OF AUTHORITIES

Page(s)

Gardenhire v. IRS,
220 B.R. 376,382 (B.A.P. 9th Cir. 1998), rev'd on
other grounds, 209 F. 3d 1145 (9th Cir. 2000) 21

Handy v. Beck,
282 Or. 653, 657-658, 581 P. 2d 68 (1978) 17

Henry v. United States,
251 U.S. 393, 395 (1920) 14

Ho v. Presbyterian Church of Lauerlhust,
116 Or. App. 115, 840 P. 2d 1340 (1992),
rev. den., 315 Or. 311 (1993) 18

Holmberg v. Armbrecht,
327 U.S. 392, 295-96 (1946)..... 21, 24

Huff v. Steward-Gwinn Furniture Co.,
713 F. 2d 67, 69 (4th Cir. 1983)..... 3

In re Copeland,
531 F. 2d 1195, (3rd Cir. 1976) 17

In Re Investors & Lenders Ltd.,
165 B.R. 389 (Bkrtcy. D. N.J. 1994) 16

Matter of Staff Mortgage & Inv. Corp.,
550 F. 2d 128 (9th Cir. 1977) 16

Jones v. TransOhio Saving Ass'n.,
747 F. 2d at 1041..... 22

TABLE OF AUTHORITIES

Page(s)

Kinzel v. Southview Chevrolet Co.,
892 F. Supp. 1211, 1216 (D. Minn. 1995) 10

Kirby v. Palos Verdes Escrow Co.,
183 Cal. App. 3d 57, 227 Cal. Rpt. 785
(Cal. App. Dist. 1 - 1992)..... 17

Knights & Ladies of Security v. Bell,
93 Okla. 272, 220 P. 594 29

Lehman v. United States,
154 F. 3d 1010, 1015-17 (9th Cir. 1998),
cert. denied, 526 U.S. 1040 (1999) 22

Miguel v. Country Funding Corporation,
309 F. 3d 1161, 1164-65 (9th Cir2002) 12, 13

Mouring v. Family Publication Services, Inc.,
411 U.S. 356, 363-4, 36 L. Ed. 2d 318,
93 S. Ct. 1652 (1973) 22

Naton v. Bank of California,
649 F. 2d 691, 696 (9th Cir. 1981) 22

Passmore v. Woodard,
37 N.C. App. 535, 541, 246 S.E.2d 795, 800 (1975)... 29

Riggs v. Government Employees Financial Corp.,
623 F. 2d 68, 70-71 (9th Cir. 1980) 22

Riviere v. Banner Chevrolet Inc.,
184 F.3. 457 (5th Cir.1999) 11

TABLE OF AUTHORITIES

Page(s)

Semar v. Platte Valley Fed. Sav. & Loan Ass'n.,
791 F. 2d 699 (9th Cir. 1986)..... 2, 3

Shasta View Irrigation District v. Amoco Chemicals Corporation,
329 Or. 151, 986 P. 2 2536 (July 29, 1999) 25

Smothers v. Gresham Transfer, Inc.,
332 Or. 83, P3d 333 (Or. 05/10/2001)..... 25

State v. Burss,
113 Or. App. 494 (1992) 19, 28

Suburban Motors of Grafton, Inc. v. Forester,
134 Wis. 2d 183, 192-193, 396 N.W.2d 351,
355 (Ct. App. 1986) 29

Taylor v. Quality Hyundai, Inc.,
150 F.3d 689 (7th Cir. 1998)*cert. denied*,
119 S. Ct. 1032 (1999) 11

Texas & Pac. Ry. Co. v. Pottorff,
54 S.Ct. 416, 417; 291 US 245; 78 L.Ed. 777 20

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235, 241 (1989) 14

Walters v. Metropolitan Educational Enterprises,
519 U.S. 202,207 (1997) 14

Williams v. Homestake Mortgage Co.,
968 F. 2d 1137, 1140 (11th Cir.1992)..... 3

TABLE OF AUTHORITIES

Page(s)

Yamamoto v. Bank of New York,
329 F. 3d 1167 (9th Cir. 2003) 13

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385, 398 (1982) 21

Statutes:

United States Code

12 U.S.C. § 1 ..... 1, 19

12 U.S.C. § 27 ..... 1, 19

15 U.S.C. § 1601 et seq 2

15 U.S.C. § 1601 (a) 2

15 U.S.C. § 1602 5

15 U.S.C.§1602(a) 3

15 U.S.C. § 1602(f) 9

15 U.S.C. § 1602(f)(2) 15

15 U.S.C. § 1604(a) 3

15 U.S.C. §1635 ..... 1, 8

15 U.S.C. § 1635 (a) 2, 3, 9, 12

15 U.S.C. § 1635 (f) 2, 3, 21

15 U.S.C. §1641 ..... 1, 8, 15

15 U.S.C. §1641 (a) 2

15 U.S.C. § 1641 (c) 1, 14, 15

15 U.S.C. § 1641(f) 1, 2, 28

Oregon Revised Statutes

O.R.S. 73.0504(a) 16, 25

Code of Federal Regulations

12 C.F.R. § 226..... 2, 10

12 C.F.R. Part 226 (2003) 3

12 C.F.R. § 226.1(a) 3

12 C.F.R. 226.15 1

12 C.F.R.226.2 ..... 1, 5

12 C.F.R. 226.2 (17) 12

12 C.F.R. § 226.2(a)(17)(i) 10

C.F.R. § 226.23(a)(3) 3

C.F.R. § 226.23 (b)(1) 3

12 C.F.R. pt. 226, supp. I, subpt. A, cmt. 2(a)(17)(i)(2).. 10

TABLE OF AUTHORITIES

Page(s)

Miscellaneous:

Regulation Z § 226.2 5

Official Staff Commentary on Regulation Z by the Board of Governors of the Federal Reserve System Regulation Z 1, 13, 25

H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13 n. 18 (1967) 22

S. Rep. No. 392, 90th Cong., 1st Sess. 1-2 n.19 (1967)... 22

S. Rep. No. 96-73, 1979 WL 10376 at *15 (1979) 10

The Federal Register, Vol. 65, No. 114, Tuesday, June 13, 2000, page 37174 28

58 Am. Jur. 2d Notice 4, at 573 (1989) 29

When is a Principal Charged with an Agent's Knowledge? 13 Duke J. of Comp. & Int'l L. 291 29

3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 793 ..... 29, 30

PETITION FOR A WRIT OF CERTIORARI

Dianna Roberts, Pro Se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit. Unpublished. (App., 1a). Judgment was entered March 10, 2006. (App., 1b) The opinion of the district court (App., 1c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2006. (App., *Infra.*, 1b). A timely petition for rehearing was denied on July 22, 1999. (App., *1e*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes involved are 15 U.S.C. §§ 1602(f), 1635,1641 (c)(f), 12 U.S.C. § 1, 27, and Regulation Z as in 12 C.F.R. 226.15, 226.2 and the Official Staff Commentary on Regulation Z by the Board of Governors of the Federal Reserve System charged with the administering Truth In Lending Act, TILA, at 15 U.S.C. § 1604(a).

STATEMENT

This case presents questions of broad practical importance

to the administration of the Truth In Lending Act (TILA), 15 U.S.C. § 1601 et seq. The Ninth Circuit effectively set aside the language of the relevant statutory provisions 15 U.S.C. §§ 1635 (a) (f) and 1641 (a)(f), C.F.R.226 and interpretations of a regulation by the Board of Governors of the Federal Reserve System who is administering TILA. This case also deal with a question concerning a national bank operating under a name that ceased to exist and having no authority, 12 U.S.C. § 27 by the Comptroller of Currency, 12 U.S.C. § 1.

1. Statutory Background

The Truth in Lending Act ("TILA") was initially passed in 1968, to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit. 15 U.S.C. § 1601 (a). As a remedial statue, TILA is to be construed liberally in favor of the consumer. *Semar v. Platte Valley Fed. Sav. & Loan Ass'n.*, 791 F. 2d 699 (9th Cir. 1986).

TILA requires creditors to disclose to consumers detailed information about the terms of transactions and provides civil remedies, including statutory and actual damages, for defects in disclosure. 15 U.S.C. § 1601, et seq. In addition to allowing consumers to recover damages for disclosure violation, in certain transactions when material disclosures are defective TILA also provides the consumer relief from the lender's security interest, and a means of recouping everything paid by the consumer. This device is Truth in Lending rescission. For three days following consummation, owners and borrowers have an unconditional right to rescind non-purchase money loans secured by their principal residence. 15 U.S.C. § 1635 (a). Where material disclosure or notice of the borrower's right to rescind are not given, or given inaccurately, the right is extended beyond the initial three day period, for up to a maximum of three years from consummation

of the transaction. 15 U.S.C §1635(a),(f).

Under TILA, a borrower generally has three days within which to rescind a transaction. 15 U.S.C. § 1635 (a); C.F.R. § 226.23 (b)(1). If the creditor fails to provide the borrower with two (2) notices of her rescission rights, the right to rescind can extends until three years from the consummation of the transaction. 15 U.S.C. § 1635 (f); C.F.R. § 226.23(a)(3). The right to rescind a transaction for violations of TILA is not indefinite. The TILA does not permit a federal right after the three-year period of § 1635 (f). *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419,118 S.Ct. 1408, 1413 (1998).

Rescission under the Truth in Lending Act is dramatically different from common law rescission as explained in *Williams v. Homestake Mortgage Co.*, 968 F. 2d 1137, 1140 (11th Cir.1992). TILA allows a borrower to rescind a consumer loan secured by the borrower's primary dwelling. 15 U.S.C. § 1635 (a). Technical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind. *Semar*,791 F. 2d 699, 701 (9th Cir. 1986). Strict compliance with the statutes is required to ensure consumer protection. Id. Minor violations are not forgiven, even if the consumer was not mislead and provided with correct disclosure of crucial terms. Id. (citing *Huff v. Steward-Gwinn Furniture Co.*, 713 F. 2d 67, 69 (4th Cir. 1983)). Rescission is the appropriate remedy for violations of TILA. *Semar*, 791 F. 2d at 704.

The Board of Governors of the Federal Reserve System ("the Fed") is the agency charged with administering TILA, 15 U.S.C.A. §§ 1602(a) and 1604(a), and has adopted extensive regulations implementing TILA, 12 C.F.R. Part 226 (2003), all of which it calls "Regulation Z." *See* 12 C.F.R. § 226.1(a). When the agency charged with enforcing a statute has promulgated a regulation that adopts a permissible construction of the statute, the courts must defer to that interpretation and not impose their own.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984). Furthermore, the Supreme Court has indicated this requirement is especially strong in the context of the TILA and Regulation Z, where even official staff interpretations of the statute and regulation should control unless shown to be irrational. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-70 (1980)

See also *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981) (citing *Milhollin*, Court indicated that absent "obvious repugnance" to statute, Fed's regulation implementing TILA and interpretation of that regulation should be accepted by courts) and *Davison v. Bank One Home Loan Services*, 2003 WL 124542, at *5 (D. Kan. 2003) (there existed unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoritative).

The Supreme Court stated that: "Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA or Regulation Z] should be dispositive." *Milhollin, id.* at 565-66. See also 444 U.S. at 562-70 (when the TILA and Regulation Z are silent on an issue, courts cannot even substitute their views for views expressed by the staff of the Fed). See also *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 211-23 (1981) (even Fed staff interpretation not yet adopted by Federal Reserve Board was entitled to deference from courts).

Lower courts have been admonished by the Supreme Court in that:

> When a court reviews an agency's construction of the statute which it administers, . . . [and where a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence

> of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Another circuit has held that "in TILA actions, we defer to the regulations interpreting the Act." Begala v. *PNC Bank, Ohio, National Ass'n*, 163 F.3d 948, 950 (6th Cir. 1998).

B. Factual Background

On August 26, 1998, Plaintiff entered into a consumer mortgage refinance transaction with WMC Mortgage Corporation, hereinafter WMC, in which the extended consumer credit that was subject to a finance charge and was initially payable to WMC Mortgage Corporation. The mortgage was a consumer credit transaction within the meaning of TILA, 15 U.S.C. § 1602 and Regulation Z § 226.2.The consumer credit transaction took place at the office of Chicago Title Insurance Company of Oregon at the address of 10001 S.E. Sunnyside Road, Suite 110, Clackamas, Oregon on August 26, 1998.

In connection with this consumer credit transaction, WMC retained a security interest in 17930 - 17932 N.E. Wasco Street, Portland, Oregon, which is the principal dwelling of the Petitioner. On September 25, 2000, WMC recorded, in the county records, a flawed Assignment, dated June 16, 2000, of the loan to the First National Bank of Chicago ("FNBC"), which had previously changed its name to Bank One effective September 13, 1999. This Assignment misspelled Dianna Roberts' name as "DIANA ROBERTS", omitted the assignee's address, and gave the assignee's old name FNBC along with omitting Bank One's name as successor trustee. (App., 1n).

In the week prior to August 6, 2001, the Plaintiff made a diligent inquiry into the system of records with the assistance of the county clerk in Multnomah County, State of Oregon, to locate parties to give notice of rescission and WMC is the only party appearing as having an interest in the property relating to the Deed of Trust found in that search.

On or about August 6, 2001, the Petitioner rescinded the transaction by sending a Notice of Rescission to the legal counsel for WMC Mortgage Corporation, Michael Mayer, 6320 Canoga Avenue, Woodland Hills, California. WMC, whose name appears as the original creditor in the system of county records, was later to become a Master Servicer under a pooling and servicing agreement which named the First National Bank of Chicago as trustee. WMC as Master Servicer had the power to act in the trustee's name. When FNBC merged into Bank One, Bank One became successor trustee under the agreement, and successor beneficiary under the Deed of Trust.

On April 22, 2002 exercised her remedy under Oregon Law and had a notarial protest created as a result of Respondent's failure to recognize her notice of rescission and the protest was delivered to the following entities: Northwest Trustee Services LLC, WMC, Bank One N.A., Regional Trustee Services Corporation, National Process Services Inc., Routh, Crabtree & Fennell and Loan Services Center, a.k.a. Fairbanks Capital. (See App., 1o). The caption of that protest stated: "PROTEST FOR NON-ACCEPTANCE OF NOTICE OF DECEMBER 13, 2001, TRUSTEE'S NOTICE OF SALE AND DEED OF TRUST, RECORDED IN THE COUNTY OF MULTNOMAH, OREGON, RECORDING NUMBER 98159385 DUE TO RECISSION".

The Respondents continued to not recognize Petitioners' notice of rescission so the Petitioner brought this action by filing her verified complaint.

A. Proceedings Below

Petitioner filed her verified complaint in this court case in the Federal District of Oregon on April 17, 2002. Both Petitioner and Respondent's filled for their respective summary judgments. On February 4, 2004 trial judge Anna J. Brown issued her Opinion and Order. (App., 1c). The trial court judge denied Petitioners motion of rescission and granted her motion for violations of FDCPA against Respondent Fairbanks and deny the remainder of her claims. The Trial Judge granted in part and denied in part the Respondents motion on their claims. Respondent Bank One was denied judicial foreclosure and did not appeal. (Bank One after losing its claim of judicial foreclosure is proceeding with a non judicial foreclosure. Petitioner has filed two motions before this Court for emergency stay and to extend injunction pending petition for certiorari.) On June 15, 2006 the Petitioner filed her Notice of Appeal. That notice of appeal was entered into the record on June 24, 2006 in the Ninth Circuit Court of Appeals. On November 23, 2004, the Petitioner's emergency motion for injunction pending appeal was granted. On December 30, 2004 the Petitioner filed an Opening Brief. On January 12, 2005 Respondents filed a Response Brief, abandoning all issues except the jurisdictional issue of whether Plaintiff/Petitioner had notified "the creditor." On January 25, 2005, Petitioner filed a Reply Brief. On February 22, 2005 Petitioner timely moved the Ninth Circuit to issue an Order to Strike Appellee's Response Brief for failure to comply with FRCP 25(d)(1)(2) and (3). On February 25, 2005 this motion was denied. On November 2, 2006 Petitioner's case was ordered submitted without oral argument on November 18, 2006. On March 10, 2006 a unpublished Memorandum was issued. (App., 1a).On March 10, 2006 a judgment was entered into the Ninth Circuit Court of Appeals. Petitioner filed a petition for publication and was denied on May 16, 2006. On May 23, 2006 a joint petition for panel rehearing and petition for rehearing en banc was denied on May 24, 2006. Therefore, the 90 days for

Petition for Writ of Certiorari began to run on May 24, 2006. On July 18, 2006, trial court, Judge Anna J. Brown, issued an order dismissing Plaintiff's rescission claim for lack of subject matter jurisdiction.

REASONS FOR GRANTING PETITION

The Ninth Circuit has changed the meaning of the word "creditor" affecting who must be served a notice of consumer's election to rescind under 15 U.S.C. §§ 1635 and 1641 and disregarded Regulation Z with their staff interpretations. The Ninth Circuit is in conflict with 5th, 7th and 11th Circuits. The Ninth Circuit did not review argument on whether equitable tolling and or equitable estoppel applied in Petitioners case. This Court's review is warranted to resolve the circuit conflict, conflict with statutory construction of the TILA, conflict with Regulation Z and to forestall any further distortion of the TILA.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE MEANING OF "CREDITOR" IN 15 U.S.C. § 1635

This case is unprecedented in that no other TILA rescission case in the 9th Circuit features: (1) a Petitioner who notified WMC, the original lender and Master Servicer and party to Pooling and Service agreement in an assignment, then was accused of failing to notify "the creditor;" (2) a Petitioner who was unable to find the recorded Assignment due to acts of the lender; (3) a recorded assignment which omits the mailing address of the assignee; (4) a recorded assignment which mis-names the assignee; (5) a recorded assignment which mis-names the Petitioner.

A. The Circuits Are Divided on the Meaning Of The Word Creditor.

The word creditor means the original lender in the statute describing the rescission process. 15 U.S.C. 1635(a) states:

> ... the obligor shall have the right to rescind the transaction ... by notifying **the creditor**, in accordance with regulations of the Board, of his intention to do so. **The creditor** shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. **The creditor** shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section. (Emphasis added).

The same statute which directs the consumer to notify "the creditor" also imposes disclosure duties on "the creditor." Clearly, therefore, Congress intended "the creditor" to mean the original lender. Congress enacted TILSRA (effective in 1982) and amended the definition of "creditor". As a result, TILA presently defines "creditor" in 15 U.S.C. § 1602(f) as

> a person who both (1) regularly extends, whether in connection with loans, sales of property or services or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is **initially payable** on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. (Emphasis added).

The legislative history of TILSRA reflects that Congress sought to simplify the definition of "creditor." *See* S. Rep. No. 96-73, 1979 WL 10376 at *15 (1979) ("TILSRA simplified definition of "creditor".). When it enacted TILA, Congress "delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit". *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d at 479 (5th Cir. 1995) (quoting *Milhollin, id.*, at 559-60).

To implement TILA, the FRB promulgated "Regulation Z", located at 12 C.F.R. § 226. *See id.* Regulation Z defines a "creditor" as "[a] person (A) who regularly extends consumer credit ..., and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract". 12 C.F.R. § 226.2(a)(17)(i).

In *Milhollin, id.*, at 565-66, the Supreme Court stated that, "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA or Regulation Z] should be dispositive". The staff interpretation is not demonstrably irrational. *See Kinzel v. Southview Chevrolet Co.*, 892 F. Supp. 1211, 1216 (D. Minn. 1995) (staff interpretation of "creditor" is rational, "as it simply restates the congressional intent to eliminate an ambiguity in the statute prior to October, 1982").

Regulation Z also contains an official FRB staff interpretation regarding the distinction between "creditors" and "assignees" in 12 C.F.R. pt. 226, supp. I, subpt. A, cmt. 2(a)(17)(i)(2) as follows:

> **If an obligation is initially payable to one person, that person is the creditor** even if the obligation by its terms is simultaneously assigned to another person. For example:
>
> *An auto dealer and a bank have a business

> relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

(Emphasis added.) See also *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 705-08 (11th Cir. 1998) (treating GMAC as assignee, even though contract was simultaneously assigned to it by automobile dealer); *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1032 (1999), *Riviere v. Banner Chevrolet Inc.*, 184 F.3. 457 (5th Cir.1999) (treating automobile dealer as "creditor" and financing companies as assignees).

The Petitioner served written notice to the original creditor WMC on August 6, 2001 which was within the three-year period. With Petitioners' notice of rescission, subject matter jurisdiction was acquired. The existence of subject matter jurisdiction is a question of law reviewed de novo. *A-Z international v. Phillips*, 323 F. 3d 1141, 1145 (9th Cir. 2003). The Ninth Circuit ruling is in conflict with 5th, 7th and 11th circuits. This Court should resolve the conflict.

B. The Meaning Of Creditor In TILA Is A Recurring Question Of Federal Law On Which Uniformity Is Important

The rescission process was intended to be self-enforcing and able to be completed without the necessity of going to court. With thousands of home loans being made daily, the question of

who the creditor is, who must be provided a notice of rescission, is very important.

The Ninth Circuit held that providing notice to a servicing agent of a note and trust deed is insufficient to provide the requisite notice to the present holder in *Miguel v. Country Funding Corporation*, 309 F. 3d 1161, 1164-65 (9th Cir2002). In *Miguel*, the original lender was Alliance, and the Bank of New York was the assignee. Neither of them received notice of rescission. Therefore, the *Miguel* court never had to decide which one of them was "the creditor" of 15 U.S.C. 1635(a),(b) and 12 C.F.R. 226.2 (17), who must be given notice of rescission.

The Supreme Court declined to review *Miguel*. It is unknown whether the *Miguel* petition for certiorari raised any of the issues that Petitioner raises her petition. The factual differences between *Miguel* and the instant case are three: First, Ms. Miguel notified neither the current creditor (the assignee) nor the original creditor. Here, Petitioner notified the original creditor. Second, in the instant case an agreement between the servicer (Fairbanks) and the assignee (FNBC / Bank One) was in evidence, showing that the servicer had a contractual duty to notify the assignee. FNBC and WMC where parties to the agreement that formed the pooling and service agreed and that WMC as Master Servicer, having the authority to act as trustee, would notify FNBC (or it's successor Bank One) of any "representations ... which materially and adversely affects the interests of the ... Mortgage Loan" and any "instruments of ... cancellation." (App. 1p). Third, Petitioner made diligent efforts with the help of the clerk to locate any Assignments in the county records, and found none.

Petitioner sent a Notice of Rescission to all parties she could locate.

Due to the fact that it has become difficult to understand whom to serve with notice of rescission due to the court cases of *Miguel v. Country Funding Corp.*, 309 F. 3d 1161 (9th Cir. 2002) and *Yamamoto v. Bank of New York*, 329 F. 3d 1167 (9th Cir. 2003), various assignments (some without name and address) the Board of Governors of the Federal Reserve System reacted and clarified in Amendments to the Official Staff Commentary On Regulation Z - Truth in Lending (May 2004) to make the rescission process easier when the consumer was not provided a name and address. The Board of Governors can only write and amend rules under the authority granted by Congress to "elaborate and expand" regulations concerning credit. See *Milhollin, id.* at 559-60. The Board of Governors can not go against the legislative intent of Congress. When the agency charged with enforcing a statute has promulgated a regulation that adopts a permissible construction of the statute, the courts must defer to that interpretation and not impose their own. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The legislative intent of Congress was to provide a simple method of service of notice of rescission to the original creditor and avoid numerous court actions in which trained lawyers have a problem locating an assignee to be served based upon rulings by the Ninth Circuit.

The Ninth Circuit has not deferred to the promulgated rules and staff comments but imposed its own interpretations. The Petitioner, as well as many other consumers, live in the Ninth Circuit which does not provide the same remedies allowed in other circuits. Petitioners' notice of rescission did acquire subject matter jurisdiction and she should be allowed to pursue her remedies. See *A-Z International, id.* The conflict among the circuits is ripe for resolution and because the scope of the TILA with its right of rescission provision being an important and recurring question as to which there should be a uniform national rule, further review is warranted.

C. The Ninth Circuit Violated The Principle Of Statutory Construction In Allowing That An Assignee Mandatorily Must Be Provided A Notice To Rescind Under 15 U.S.C. § 1641 (c)

Review by this Court is appropriate for the additional reason that the Ninth Circuit exacerbated the error in limiting the plain language of the TILA provisions. This decision flies in the face of this Court's modern jurisprudence of statutory construction. The Ninth Circuit failed to consider the statutory context and legislative history of TILA.

15 U.S.C.§ 1641 (c) states:

(c) Right of rescission by consumer unaffected

Any consumer who has the right to rescind a transaction under section 1935 of this title may rescind the transaction as against any assignee of the obligation. (Emphasis added.)

In reading the above section it is noted that it relates to 15 U.S.C. § 1935, the section defining creditor, and the use of the word "may" in context of the assignee. Nothing in 1641 (c) requires the consumer to rescind the transaction against the assignee. Undefined statutory terms must bear their "ordinary, contemporary, common meaning." *Walters v. Metropolitan Educational Enterprises*, 519 U.S. 202,207 (1997). "[T]he law uses familiar legal expressions in their familiar legal sense. *Bradley v. United States*, 410 U.S. 605, 609 (1973) (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920) (Holmes, J.)). The common meaning of "may" will not be treated as a word of command or duty. There is no duty to give notice of rescission to the assignee but a consumer may. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ([W]here, as here, the

statute's language is plain, 'the sole function of the court is to enforce it according to the terms'), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

When providing for rescission against an assignee, neither Congress nor the Federal Reserve Board ever specified that "the assignee" must be notified – only "the creditor." Neither body ever redefined "the creditor" to include an assignee. The definition of "creditor" in 15 U.S.C. § 1602(f)(2) controls 15 U.S.C. § 1641. Clearly, when rescinding against an assignee, the consumer must notify "the person to whom the debt arising from the consumer credit transaction is initially payable."

If Congress had intended the term "creditor" to include assignees, it would have included such a provision in the definition, or said so in Section 1641(c). The term "creditor" does not include assignees. Therefore, "the creditor" who must be notified is the original lender (in the instant case, WMC) and not the assignee (Bank One). Neither the above statute nor Regulation Z specifies whom the consumer must notify in order to rescind "as against [an] assignee." Petitioners' notice of rescission did acquire subject matter jurisdiction. See *A-Z International, id.* Review by this Court is warranted to remedy promptly the gross distortion of the TILA by the Ninth Circuit.

II. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTED AN ASSIGNMENT WITHOUT THE CORRECT NAME AND ADDRESS.

The trial court and the Court of Appeals both relied upon a public recording filed on September 25, 2000, WMC recorded, in the county records, a flawed Assignment, dated June 16, 2000, of the loan to the First National Bank of Chicago ("FNBC"), which had previously changed its name to Bank One effective September 13, 1999. This Assignment misspelled Dianna

Roberts' name as "DIANA ROBERTS", omitted the assignee's address, and gave the assignee's old name FNBC instead of the correct name Bank One or had Bank One successor to FNBC. (App., 1n).

State law provisions are preempted to the extent that they contradict the requirements in the following chapters of the TILA and the implementing sections of Regulation Z: When no address is provided the Petitioner was left with only state law to preserve her remedies.

Since there was no known address, under Oregon law, excused presentment notice of dishonor is allowed when reasonable diligence does not enable a party to make said presentment. O.R.S. 73.0504(a). On April 22, 2002 exercised her remedy under Oregon Law and had a notarial protest created and had to be delivered to the following entities: Northwest Trustee Services LLC, WMC, Bank One N.A., Regional Trustee Services Corporation, National Process Services Inc., Routh, Crabtree & Fennell and Loan Services Center, a.k.a. Fairbanks Capital.

A recording of an assignment in instrument is not enough to perfect and Bankruptcy courts have followed the uniform commercial code. See *In Re investors & Lenders Ltd.*, 165 B.R. 389 (Bkrtcy. D. N.J. 1994). Under the uniform commercial code, the only notice sufficient to inform all interest parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by the actual possession of the security. See *Matter of Staff Mortgage & Inv. Corp.*, 550 F. 2d 128 (9th Cir. 1977).

The underlying policy behind perfection by possession is that possession of instrument by a third party, coupled with the owner's lack of possession, alerts prospective creditors that

ownership rights may be restricted or encumbered. *In re Copeland*, 531 F. 2d 1195, 1204 (3rd Cir. 1976); See *In re Staff Mortgage & Inv. Corp.*, supra; *Kirby v. Palos Verdes Escrow Co.*, 183 Cal. App. 3d 57, 227 Cal. Rpt. 785 (Cal. App. Dist. 1 - 1992).

The party claiming real property ownership has the burden of affirmatively proving ownership. *Darling v. Christensen*, 166 Or. 17, 25-26, 109 P. 2d 585 (1941). Oregon recognizes, for purpose of public policy, that public records should generally be available to members of the public for their own personal purposes. *Handy v. Beck*, 282 Or. 653, 657-658, 581 P. 2d 68 (1978). Respondent Bank One bases its claim on a document captioned "ASSIGNMENT OF DEED OF TRUST" (App.,1n) which shows assignment to another party, no address provided and a document captioned "APPOINTMENT OF SUCCESSOR TRUSTEE" (App., 1q) which was allegedly filed for Bank One by attorney in fact Fairbanks Capital Corporation. (Fairbanks Capital Corporation is the only party to file a Proof of Claim into a bankruptcy court filed earlier by the Petitioner. Respondents did not file a Proof of Claim.) Bank One will not admit to the document being genuine (App., 1r) and it contains no address for Bank One or Fairbanks. Bank One admits there is no 'relationship' between the Respondent Bank One and Fairbanks. (App.,1r).

The assignment (App., 1n) states it was for 'valuable consideration" that WMC assigned its interest to FNBC as trustee. However, Respondent WMC has stated that it did not receive any consideration from FNBC. (App., 1v). Respondent Bank One stated that the trustee, FNBC, did not provide any consideration for the assignment but that any consideration would have been "provided" by another entity on or about September 1, 1998 which is prior to the recording of the original trust deed into county records. (App., 1w). The deed was assigned prior to recording the first deed and Respondent WMC waited until

September of 2000, two years later, to file the assignment which did not have Respondents Bank One's name as successor to FNBC. (App., 1n).

This assignment did not provide a correct name and address, thereby failing to give notice to the consumer of the identity and address of the assignee. In addition, this assignment did not spell the Petitioners name correctly into a system of records which requires the correct name to locate any recording under the system set up by the clerk of county records. Unlike certain consumer transactions, this consumer transaction involved an interest in real property, therefore it was controlled by the Statute of Frauds. A written instrument concerning the Petitioner may have been filed but was not filed correctly. Petitioner, with the aid of the clerk of records, did a search and found no assignment under her name thereby relieving her of any duty to provide notice of rescission to any assignee.

Petitioner has a right to rely on information to provide in these public recordings. **Where required information not stated directly in notice could be readily determined from information given, notice was insufficient.** (Emphasis added) *Ho v. Presbyterian Church of Lauerlhust*, 116 Or. App. 115, 840 P. 2d 1340 (1992), Sup. Ct. review denied, 315 Or. 311 (1993); *Carroll v. Newcomb*, 132 Or. App. 526, 888 P. 2d 1062 (1995). There is no way Petitioner could determine from information recorded in public records to give any written notice to The First National Bank of Chicago or Bank One when no address was provided. Due to the fact no address, incorrect name of assignee and Petitioner's misspelled name was not provided, there was no duty placed upon the Petitioner to give notice of rescission to Bank One.

Furthermore, Petitioner gave notice of rescission to WMC, original lender and party to the Pooling and Service Agreement of

which FNBC is the trustee. WMC is an agent (Master Servicer) of FNBC and of its successor Bank One trustee. Oregon holds to the principle that notice to an agent is notice to principal (Bank One). See *State v. Burss*, 113 Or. App. 494 (1992). Petitioner gave notice of rescission to WMC, original creditor and Master Servicer as a party to a pooling and service agreement, which made the assignment and had authority under the terms of the pooling and service agreement to receive the notice of rescission, on August 6, 2001 within the three year statute of limitations thereby acquiring subject matter jurisdiction.

This Court's review is warranted to resolve circuit conflict, conflict with Regulation Z and forestall further distortion of the TILA.

III. THE NINTH CIRCUIT ERRED WHEN IT ACCEPTED AN ASSIGNMENT MADE TO A NATIONAL BANK THAT CEASED TO EXIST FOR ONE YEAR.

The Respondent Bank One is a national bank under the authority of the Comptroller of Currency. Congress allowed for a national bank in Title 12 and the Comptroller office at 12 U.S.C. § 1. The issue is whether Bank One's predecessor, FNBC, operated outside its authority (12 U.S.C. § 27) by continuing to conduct business more than year after a name change to Bank One.

The assignment made to FNBC was entered into public records by WMC on September 25, 2000. According to the Comptroller of Currency, FNBC became Bank One N.A. on September 13, 1999. (App., 1x) WMC and FNBC were parties to a pooling and service agreement. (App., 1s). Bank One's name should have appeared on that assignment since it was the successor to FNBC. For FNBC's name to appear on that document the assignment had to be made before September 13, 1999.

The authority of a National Bank is what Congress has granted. "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied. For the act under which national banks are organized constitutes a complete system for their government." *Texas & Pac. Ry. Co. v. Pottorff*, 54 S.Ct. 416, 417; 291 US 245; 78 L.Ed. 777.

For a valid assignment to be made by WMC after September 13, 1999, Bank One's name (not FNBC's name) would have had to appear on that assignment. Even for WMC to make an assignment before September of 1999 and wait to 2000 to record that assignment, WMC, as a party to the pooling and service agreement, had a duty to at least put Bank One's name as successor to FNBC. "The court ... concludes that a contract of a corporation that is ultra vires, or outside the object of its created as defined in the law of its organization, is wholly void and of no legal effect." *Centra Transp. Co. v. Pullman's Palace Car Co.* 139 U.S. 24, 11 S.Ct. 478.

WMC is a party to the pooling and servicing agreement, which has and runs a trust office in the FNBC building, now Bank One building, in Chicago. WMC had knowledge that FNBC changed its name to Bank One, and still recorded an assignment without naming Bank One as successor to FNBC on that document. The recording of this assignment prejudiced the Petitioner in her attempt to locate information from public records which should have been recorded correctly, since under the statute of frauds an interest in real property must be in writing and compliant with state law before being recorded. Since Bank One had no authority to operate under the name of FNBC, the assignment was void; WMC was still the creditor; and the Petitioner had no duty to provide a notice of rescission to FNBC or to its successor Bank One.

This Court's review is warranted to forestall distortion of the National Bank Act and other authorities under Title 12.

IV. THE NINTH CIRCUIT ERRED BY NOT ACCEPTING OREGON LAW REMEDIES TO DISHONOR WHEN NO NAME OR ADDRESS IS PROVIDED IN DOCUMENT UNDER EQUITABLE TOLLING AND EQUITABLE TOLLING AND ESTOPPEL AS IT RELATES CONCEALMENT AND THEIR EFFECTS ON THE STATUTE OF LIMITATIONS UNDER TILA.

This Court should consider whether the lack of the correct name of an assignee or their omitted address affects the rescission statute of limitations of the TILA. When Congress enacts statutes creating rights or benefits, it can impose time limits on their availability. These time limits can either completely extinguish the right or bar the remedy for enforcement. Courts have ruled that section 1635(f) is an absolute limitation on rescission actions thereby creating a statute of repose. However, there are situations in which that is not true.

Courts continue to have jurisdiction under their discretion to consider particular circumstances affecting the ability of a party seeking review to comply with the time limits, which can be tolled when principles of equity render their rigid application unfair. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982); *Holmberg v. Armbrecht*, 327 U.S. 392, 295-96 (1946).

Both equitable tolling and equitable estoppel can be used to "stop a limitations period from continuing to run after it has already begun to run". See *Gardenhire v. IRS*, 220 B.R. 376,382 (B.A.P. 9th Cir. 1998), rev'd on other grounds, 209 F. 3d 1145 (9th Cir. 2000). But while tolling "focuses on the plaintiff's excusable ignorance of the limitations period and lack of prejudice to the defendant," estoppel "focuses on the actions of the defendant."

Naton v. Bank of California, 649 F. 2d 691, 696 (9th Cir. 1981); see also *Lehman v. United States*, 154 F. 3d 1010, 1015-17 (9th Cir. 1998) (discussing both theories), cert. denied, 526 U.S. 1040 (1999)("equitable tolling applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when the plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit").

Congress through TILA sought to protect consumers' choice through full disclosure and to guard against the divergent and at times fraudulent practices stemming from the uninformed use of credit. See *Mouring v. Family Publication Services, Inc.*, 411 U.S. 356, 363-4, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973) (citing H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13 n. 18 (1967); S. Rep. No. 392, 90th Cong., 1st Sess. 1-2 n.19 (1967)). The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer. *Riggs v. Government Employees Financial Corp.*, 623 F. 2d 68, 70-71 (9th Cir. 1980). As the Sixth Circuit noted, "only if Congress clearly manifests its intent to limit the federal court's jurisdiction will it be precluded from addressing allegations of fraudulent concealment which by their very nature, if true, serve to make compliance with the limitation period imposed by Congress an impossibility." *Jones v. TransOhio Saving Ass'n.*, 747 F. 2d at 1041.

Equitable estoppel and equitable tolling are two distinct concepts often blurred by inconsistent use of the terminology. "Our court has occasionally used the term equitable tolling as a blanket phrase which included equitable estoppel as well." *Dring v. McDonnell Douglas Corp.*, 58 F. 3d 1323, 1328 (8th Cir. 1995). As a rule, however, '[e]quitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim." *Id.* (quoting *Chakonas v. City of Chicago*, 42 F. 3d 1132, 1135 (7th Cir. 1994)). Equitable tolling does not require any misconduct on the part of

the defendant. *Bell v. Fowler*, 99 F. 3d 262, 266 n.2 (8th Cir. 1996).

The Petitioner raised the issue of equitable tolling and estoppel in her response to Respondent Bank One's motion for summary judgment and her cross motion for summary judgment. The trial court judge did not speak to this in any detail or grant Respondent Bank One's claim that it is entitled to summary judgment, on the grounds that Plaintiff failed to provide Bank One with notice of her intent to rescind the transaction within the three-year time period. (App., 1c). The trial judge went into the subject matter of the TILA, ruled that Petitioner received two copies and denied Petitioner's rescission claim. That ruling was the center point of Petitioner's appeal to the Ninth Circuit.

For the trial court to go forward with the issue of jurisdiction being raised, it would have dealt with the question first at summary judgment before going forward on any other point. The Petitioner raised the issue of equitable tolling and estoppel at summary judgment as well with the Ninth Circuit over the issue of subject matter jurisdiction.

On April 12, 2002, the Plaintiff had requested a notarial protest and was granted same concerning the Deed of Trust. (App., 1t). Copies of the protest were sent to all parties and/or agents having and/or showing an interest in the Deed of Trust. Notices were sent to Northwest Trustee Services, LLC., WMC, Bank One, Regional Trustee Services Corporation, Nationwide Process Service, Inc., Routh, Crabtree, Fennell, and Loan Services Center, a.k.a Fairbanks Capital. (App., 1t).

The Respondent Bank One did receive notice or Petitioner's right to rescind in April of 2002. Respondent Bank One would have received notice sooner had any assignment been located, with Respondent's name and address appearing upon it.

Yes, it is past the statute of limitations, but equitable estoppel does not require affirmative misconduct on behalf of the opposing party; rather, all one need show is that by the exercise of reasonable diligence, the proponent of tolling could not have discovered essential information bearing on the claim.

Respondent WMC made the assignment to FNBC as trustee under a pooling and service agreement. FNBC, predecessor to Respondent Bank One, and WMC were parties to the pooling agreement. WMC managed the trust office in the FNBC building, later to become Bank One building. WMC filed an assignment omitting the address of the assignee and did not provide the correct name of the assignee. After the assignment WMC continued as the Master Servicer of this pooling agreement. If a party is in privity, or principal-agent relationship with a defendant, defendant's approval of the concealment may be sufficient to toll the statute. Unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations. *Holmberg,* 327 U.S. at 394-96.

Since there was no known address, under Oregon law, excused presentment notice of dishonor is allowed when reasonable diligence does not enable a party to make said presentment. O.R.S. 73.0504(a). Under Reg. Z, state law determines whether delivery of the notification of rescission is made. The Amendments to the Official Staff Commentary on Regulation Z Truth in Lending states:(App., 1m)

> 2. *Comment 15(a)(2)-1 is amended by adding two sentences at the end to read as follows:*
>
> * * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments

> constitutes delivery to the creditor or assignee. **State law determines** whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case **where the creditor fails to designate an address for sending the notification of rescission.** (Emphasis added).
>
> * * *
>
> 5. *Comment 23(a)(2)-1 is amended by adding two sentences at the end to read as follows:*
>
> * * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. **State law determines whether delivery of the notification** to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission. (Emphasis added).

The proposition of traditional agency principles of the common law of England is still in force in America. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court should accept state common law as authority, and Oregon common law states that notice to agent is notice to principal. The Oregon Supreme Court affirmed that English common law forms a part of Oregon common law, in *Shasta View Irrigation District v. Amoco Chemicals Corporation*, 329 Or. 151, 986 P. 2 2536 (July 29, 1999).See also *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, P3d 333 (Or. 05/10/2001).

It was not until after three year period of statute of limitations passed that Petitioner became aware of this assignment, due to the errors in that assignment. Respondent's action in the filing of assignment prejudiced the Petitioner. Under equitable tolling and estoppel the Petitioner did provide notice of rescission via her protest of April 22, 2002, of which Respondent Bank One received a copy; and via the lawsuit filed on thereby acquiring subject matter jurisdiction. This Court's review is warranted to resolve the circuit conflict, conflict with Regulation Z and forestall further distortion of the TILA.

V. THE NINTH CIRCUIT ERRED BY NOT ACCEPTING SERVICE OF NOTICE TO RESCIND ACCORDING TO THE POOLING AND SERVICE AGREEMENT.

A. Terms of Pooling Agreement Allow Presentment Of Documents To Master Servicer WMC, Original Creditor.

The issue before this Court is whether written notice to WMC as a Master Servicer of a pooling and service agreement comply as notice to creditor and or assignee under the terms of that agreement and/or under the TILA. The Pooling and Servicing Agreement states:

> The Master Servicer ... upon the discovery by the Seller [WMC], the Master Servicer [WMC], or the Trustee ... or the Company [WMC Secured Assets Corporation] **of a breach of any of the representations and warranties ... which materially and adversely affects the interests of** ... Mortgage Loan, **the party discovering such breach shall give prompt written notice to the**

other parties. [Emphasis added.] (App., 1u).

Names of the parties are located on the first page of the pooling and service agreement (App., 1s). The Pooling and Servicing Agreement, on page 52 (App., 1p), goes on to state:

> "(a) [T]he Master Servicer [WMC] shall take such actions as are necessary to ensure the servicing and administration of the mortgage loans ... Without limiting the generality of the foregoing, the Master Servicer ... is hereby **authorized and empowered by the Trustee to, execute and deliver, on behalf of itself, ... the Trustee or either of them, any instruments of** satisfaction, **cancellation**, partial or full release, discharge **and all other comparable instruments,..**"

(Emphasis added.) Defendants failed to deny the following allegation from the First Amended Complaint (App., 1t):

> ¶ 69. WMC as Master Servicer, as well as any Subservicer, has a duty to deliver to the Trustee any instrument of satisfaction, cancellation and all other comparable instruments with respect to Mortgage Loans under the terms of the Pooling and Servicing Agreement.

The power of the Master Servicer, WMC, is not limited to just servicing of the loan. Respondents make a claim that providing WMC notice of rescission does not constitute notice to the assignee under 15 U.S.C. § 1541 (f)(1) which states: " A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for the purpose of this section **unless** the servicer is **or was the**

owner of the obligation." (Emphasis added). Now WMC is Master Servicer under a pooling and service agreement which caused the assignment of deed of trust. WMC, WMC Secured Assets Corporation and the First National Bank of Chicago were all parties in forming the pooling and servicing agreement. FNBC, as Trustee, is the assignee.

The Federal Register, Vol. 65, No. 114, Tuesday, June 13, 2000, page 37174, states:

> E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets **and is fully responsible for servicing**, directly or through subservicers, the assets of the trust. [Emphasis added]

Now the Petitioner served notice of rescission to WMC, who was the original lender as well as Master Servicer, which is the same as servicer under § 1641 (f)(1), which can be treated as the assignee. According to the terms of the pooling and servicing agreement, the Master Servicer can accept the Petitioners' notice of rescission. Petitioner served notice on August 6, 2001, within the three year period of statute of limitations, for a loan made on August 26, 1998. With notice of rescission being provided within three years, the Petitioner acquired subject matter jurisdiction for her cause of action and should be allowed her remedy. See *A-Z International, id.* This Court's review is warranted to forestall further distortion of the TILA.

B. Oregon Law And Cases In Other Courts Support The Proposition That Notice To Agent Is Notice To Principal.

Oregon law allows for proposition of notice to agent is notice to principal. See *State v. Burss*, 113 Or. App. 494 (1994) (See fn. 3). Cases in other courts support the proposition that

notice to agent is notice to principal. See, for example, *Passmore v. Woodard*, 37 N.C. App. 535, 541, 246 S.E.2d 795, 800 (1975) (notice to agent is notice to principal); see also 58 Am. Jur. 2d Notice 4, at 573 (1989); see also *When is a Principal Charged with an Agent's Knowledge?* 13 Duke J. of Comp. & Int'l L. 291; see also *Bonded Royalties Inc. v. Jefferson*, 1935 OK 846, 50 P.2d 281, 174 Okla. 345:

> ¶21 No principle of law is better settled than that a principal is bound by the knowledge of the agent, or, otherwise stated, notice to the agent constitutes notice to the principal.
>
> ¶22 This rule is so well settled that it needs no citation in support thereof, and we will not prolong this opinion further than to say that this rule is set forth by this court in the case of *Knights & Ladies of Security v. Bell*, 93 Okla. 272, 220 P. 594, in the following words:
>
> "As a general rule, notice to the agent and knowledge obtained by him while acting within the scope of his authority is notice to the principal."

See also 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 793 (rev. perm. ed. 1994) (notice to agent is imputed to principal "if the matter" about which notice is given "is relevant or pertinent to the subject matter of the agency" or employment); *see also Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 192-193, 396 N.W.2d 351, 355 (Ct. App. 1986):

> [C]orporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent

> receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation. [Emphasis added])

(quoting 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 790 (rev. perm. ed. 1975)).

Subject matter jurisdiction was acquired when notice of rescission was provided to agent WMC. See *A-Z International, id.* This Court should resolve the conflict with Regulation Z and forestall further distortion of the TILA.

CONCLUSION

Finally, Petitioner is not an attorney and is inexperienced in procedure as practiced in the U.S. Supreme Court. If this submission is found wanting in one or more particulars, it is incumbent upon the Court to inform Petitioner of the deficiencies, their specifics and assist the Petitioner in correcting the submission, and the Petitioner hereby respectfully requests such assistance.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Dianna Roberts,
Petitioner,

v.

WMC Mortgage Corporation, Bank One, N.A., Fairbanks Capital Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Appendix A (court of appeals memorandum, filed March 10, 2006)	1a
Appendix B (court of appeals judgment entered March 10, 2006)	1b
Appendix C (trial court opinion and order dated February 4, 2004)	1c
Appendix D (court of appeals order denying request for publication, filed May 6, 2006)	1d
Appendix E (court of appeals order denying rehearing and petition for rehearing en banc, filed on May 24, 2004)	1e
Appendix F (15 U.S.C. § 1604, Disclosure guidelines)	1f
Appendix G (15 U.S.C. § 1635, Right of rescission as to certain transactions)	1g

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Appendix H (15 U.S.C. § 1641 (c) and (f),
Liability of assignees;
Right of rescission by consumer unaffected;
Treatment of servicer) 1h

Appendix I (12 U.S.C. § 1,
Office of Comptroller of the Currency) 1i

Appendix J (12 U.S.C. § 27,
Certificate of authority to commence banking) 1j

Appendix K (12 C.F.R. § 226.15,
Right of rescission) 1k

Appendix L (12 C.F.R. § 226.20,
Subsequent disclosure requirements) 1l

Appendix M (Board of Governors of the
Federal Reserve System Amendments to the
Official Staff Commentary on Regulation Z,
May 2004) 1m

Appendix N (assignment of Deed
of Trust from WMC to The First
National Bank of Chicago) 1n

Appendix O (protest of April 12, 2002) 1o

Appendix P (page 52, section 3.01 of pooling and servicing agreement dated as of September 1, 1998) 1p

Appendix Q (appointment of successor trustee) 1q

Appendix R (questions and response of questions 3, 4 and 10 of Bank One's response to first set of interrogatories dated December 2, 2002) 1r

Appendix S (cover page of pooling and servicing agreement dated as of September 1, 1998) 1s

Appendix T (paragraphs 65, 66 and 69 of Plaintiffs' 1st amended verified complaint) 1t

Appendix U (page 47, section 2.04 of pooling and servicing agreement dated as of September 1, 1998) 1u

Appendix V (page 3, question 7 of WMC's amended response to depositions upon written questions of July, 2003) 1v

Appendix W (page 2, question 2 of Bank One, N.A.'s amended response to deposition upon written questions to defendant Bank One N.A.) 1w

Appendix X (Comptroller of the Currency's authorization for Bank One to conduct business as of September 13, 1999) 1x

Appendix Y (15 U.S.C. § 1602(f) Definition of "Creditor") 1y

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted November 18, 2005**
Portland, Oregon

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO***, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

Dianna Roberts (Roberts) appeals the district court's grant of summary judgment in favor of WMC Mortgage Corp. (WMC), Bank One, N.A. (Bank One), and Fairbanks Capital Corp. (Fairbanks) on her claim for rescission of a deed of trust and promissory note (collectively Deed of Trust) under the Truth In Lending Act (TILA), 15 U.S.C. § 1601-1677. In addition, Roberts appeals the district court's denial of her motion to reopen discovery pursuant to Federal Rule of Civil Procedure 56(f) and the district court's award of costs to WMC Mortgage, Bank One, and Fairbanks Capital.

I. The District Court's Subject Matter Jurisdiction

Bank One raises the issue of the district court's subject matter jurisdiction over Roberts' TILA rescission claim for the first time on appeal. However, challenges to a federal court's subject matter jurisdiction cannot be waived and may be raised at any time. *See United States v. Cotton*, 353 U.S. 625, 630 (2002). The district court lacked subject matter jurisdiction over Roberts' rescission claim because she failed to deliver a notice of rescission to Bank One, the current beneficiary of her Deed Of Trust, within TILA's three-year limitations period. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). We therefore vacate the district court's grant of summary judgment as to Robert's TILA rescission claim, and remand with instructions to the district court to dismiss this claim for lack of subject matter jurisdiction.

II. The District Court's Denial of Additional Discovery

The district court is entitled to wide latitude in making discovery rulings, and its ruling should not be overturned "in the absence of a clear abuse of discretion." *California ex. rel. California Dep't Of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)(citation omitted). In the context of

a Rule 56(f) motion, "[w]e will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.2d 839, 844 (9th Cir. 1994)(emphasis in original). Roberts failed to make the required showing, and we therefore conclude the district court did not abuse its discretion by denying her Rule 56(f) motion for additional discovery. *See Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996).

III. The District Court's Award Of Costs.

Roberts alleges that the district court's award of costs to Bank One and WMC was improper because WMC and Bank One filed a Bill of Costs but failed to file a motion. However, under Oregon's local rules, to recover costs other than attorneys fees, the prevailing party is required to file and serve only a Bill of Costs. *See* D. Or. R. 54.1.

Roberts also asserts that the district court's award of costs was improper because WMC and Bank One were not prevailing parties. A party who is dismissed for lack of subject matter jurisdiction is not a prevailing party. *See Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003). However, where multiple claims are asserted and a litigant is successful on some claims, an award of costs need not be apportioned if the claims are so inextricably intertwined that apportionment would be meaningless. *See, e.g. Gracie v. Gracie*, 217 F.3d 1060, 1069-70 (9th Cir. 2000). The district court granted summary judgment in favor of WMC and Bank One on the remainder of Roberts'

claims,[1] making them prevailing parties. *See Buckhannon Bd. & Care Home, Inc. V. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). The record reflects that Roberts' claims were intertwined and that the district court's award of costs was unitary, making apportionment meaningless. *Gracie*, 217 F.3d at 1070.

We VACATE the district court's ruling on Roberts's TILA claim and REMAND with instructions to the district court to dismiss Roberts's rescission claim for lack of subject matter jurisdiction. We AFFIRM the district court's ruling in all other respects. Costs on appeal are awarded to Appellees.

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[1]The district court granted summary judgment in favor of Bank One and WMC on a Fair Debt Collection Practices Act claim. The district court also granted summary judgment in favor of WMC on Unlawful Trade Practices, misrepresentation, unilateral mistake, and fraudulent alteration claims.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

JUDGMENT

Appeal from the United States District Court for the District of Oregon (Portland).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

On consideration whereof, it is now here ordered-and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 03/10/06

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DIANNA ROBERTS,
Plaintiff,

CV 02-499-BR
OPINION AND ORDER

v.

WMC MORTGAGE CORP.; FINANCIAL LINK; DAVE LAVALLEY; NORTHWEST TRUSTEE SERVICES, LLC; BANK ONE, N.A.; CHICAGO TITLE INSURANCE COMPANY OF OREGON; MARGARET A. HARBAUGH; CAROLYN KNAUB; and REGIONAL TRUSTEE SERVICES CORPORATION,

Defendants.

DIANNA ROBERTS
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Plaintiff, *Pro Se*

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BROWN, Judge.

This matter comes before the Court on the Motion for Summary Judgment (#217) filed by Defendants WMC Mortgage Corporation; Bank One, N.A.; and Fairbanks Capital Corporation, and Plaintiff's [Cross] Motion for Summary Judgment (#229). For the following reasons, the Court **DENIES** Plaintiff's Motion and **GRANTS in part** and **DENIES in part** Defendants' Motion.

BACKGROUND

In her First Amended Complaint, Plaintiff asserts six claims. Plaintiff's First Claim is against Defendants WMC, Bank One, and Fairbanks for violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq*. Plaintiff's Second Claim is against the same three Defendants for violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq*. Plaintiff's Third, Fourth, and Sixth Claims are common law claims of misrepresentation, unilateral mistake, and fraudulent alteration against WMC only. Plaintiff's Fifth Claim is against WMC only for violation of Oregon's Unfair Trade Practices Act (UTPA), Or. Rev. Stat. § 646.605, *et seq*.

Plaintiff has voluntarily dismissed her claims against all other Defendants.

Defendant Bank One also asserts a counterclaim for judicial foreclosure.

FACTS

The record in this case is extremely difficult to follow.

Plaintiff provides multiple copies of the same pages of her deposition transcript and attaches them to her Affidavit in no discernible order. Although both Plaintiff and Defendants mark documents as exhibits to their respective Affidavits, neither cites to any document by its exhibit number. Defendants, moreover, force the Court to follow a rabbit trail to find the documents they rely on to support their factual assertions. For example, in their supporting memoranda, Defendants cite to their Concise Statement of Facts rather than to the source document that supports the factual assertion. In

their Concise Statement, in turn, Defendants cite to various affidavits, primarily the Affidavit of John E. Kennedy, one of Defendants' attorneys. Although Kennedy attaches deposition transcripts as exhibits to his Affidavit, he also unnecessarily summarizes these transcripts.[1] Each of Kennedy's summaries contains a reference to a deposition transcript page number, but does not identify the exhibit letter or the exhibit page number.

To find the source of any particular factual assertion, therefore, the Court first must find the cited paragraph in Defendants' Concise Statement of Facts, locate the paragraph in the Kennedy Affidavit that is cited in the Concise Statement, and then search through the many pages attached to the Kennedy Affidavit to find the referenced page. Compounding the problem, Plaintiff followed Defendants' inefficient and confusing method when she prepared her response and [Cross] Motion for Summary Judgment.

This method of preparing a factual record is, to say the least, cumbersome. Nonetheless, after a painstaking review of the record, the Court finds many of the facts asserted by Defendants are disputed by Plaintiff and controverted by Plaintiff's testimony. Most of these disputed facts, however, are not material to the issues before the Court. In any event, the following facts appear to be uncontroverted.

Plaintiff is the owner of a home located at 17932 N.E. Wasco, Portland, Oregon, which is her primary residence. Plaintiff purchased the property in 1974, and by 1996 she had paid off all mortgages and owned the property outright. Between July 11, 1997, and August 7, 1997, however, Plaintiff borrowed $77,000 from Joy Masako and Mitsuyo Taira on promissory notes at 15 percent interest secured by Plaintiff's

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[1]Kennedy's summaries of the deposition testimony are not admissible evidence, and, therefore, the Court does not rely on them. The Court considers only the transcripts and other exhibits attached to Kennedy's Affidavit.

home.

In January 1998, Plaintiff began the process of refinancing her home in order to pay off the promissory notes. Plaintiff hired David LaValley, a mortgage broker with Financial Link, to help her find a loan.[2] On April 1, 1998, LaValley prepared and
Plaintiff signed a Uniform Residential Loan Application. Shortly thereafter, LaValley procured an adjustable rate mortgage loan (ARM) for Plaintiff through Northern Pacific Funding Group. On April 17, 1998, Plaintiff signed the loan documents at the office of Chicago Title Insurance Company of Oregon. Three days later, on April 20, 1998, Plaintiff rescinded the loan by Western Union telegram because she did not want an ARM.

LaValley apparently continued to search for a loan for Plaintiff. On August 19, 1998, LaValley faxed to Plaintiff a Federal Truth-in-Lending Disclosure Statement (HUD-1) and a Good Faith Estimate. Plaintiff signed both documents and faxed them back to LaValley the same day.[3] The HUD-1 includes a statement that the loan contains a "variable rate feature." The lender is not identified on this document. Kennedy Aff. Ex. C at 18.

Ultimately, Plaintiff entered into a loan with WMC. The closing on this loan took place on August 26, 1998, at Chicago Title. Carolyn Knaub, an escrow officer with Chicago Title, handled the closing. The loan was secured by a Deed of Trust

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[2]Plaintiff originally named LaValley and Financial Link as Defendants, but she later voluntarily dismissed her claims against them.

[3]Plaintiff denies signing many of the documents that appear to bear her signature. It is unclear, however, whether she denies signing the August 19, 1998, HUD-1. In any event, Plaintiff admits she received the HUD-1 prior to closing. *See* 1st Am. Compl. ¶ 38, and Ex. G.

on Plaintiff's residence. Part of the WMC loan proceeds were used to pay in full the Masako and Taira promissory notes, and Plaintiff received approximately $20,000 of the loan proceeds. The record is unclear as to which documents Plaintiff signed and/or received at closing. Plaintiff repeatedly refuses to acknowledge receipt of documents or to confirm her signature on them on the basis that the exhibits presented at her deposition were photocopies. In addition, at Plaintiff's deposition, defense counsel failed to follow up adequately on Plaintiff's denials. In any event, Plaintiff admits she did not read the documents she received either during closing or at any point thereafter.

On September 4, 1998, a Deed of Trust showing Dianna Roberts as the grantor, Regional Trustee Services Corporation as the trustee, and WMC as the beneficiary was recorded in Multnomah County. On September 1, 1998, WMC Secured Assets Corporation (WMC Secured Assets), WMC, and FNBC entered into a Pooling and Servicing Agreement. By virtue of this Agreement, WMC Secured Assets transferred all right, title, and interest in Plaintiff's mortgage and trust deed to FNBC. WMC is identified in the Agreement as the "Master Servicer." The Deed of Trust, however, shows WMC as the beneficiary, and an Adjustable Rate Note shows WMC as the lender. WMC Secured Assets does not appear on either the Note or the Deed of Trust. It is unclear, therefore, how WMC Secured Assets acquired any right, title, or interest in Plaintiff's loan. The significance of the Pooling and Servicing Agreement is also unclear because only parts of the Agreement are in the record, and none of the parties explains the function of the document or its relevance to Plaintiff's claims.

On September 25, 2000, an assignment of Plaintiff's Deed of Trust was recorded in Multnomah County, which showed WMC had assigned the Deed of Trust to First National Bank of Chicago (FNBC). Although the Assignment is dated June 16, 2000, Plaintiff contends the assignment from WMC to

FNBC occurred sometime before September 4, 1998. Bank One is a successor to FNBC by virtue of a merger, and FNBC changed its name to Bank One effective September 13, 1999. Defendants, however, do not explain why the Assignment dated June 16, 2000, reflects the name FNBC instead of Bank One.

On or about August 6, 2001, nearly three years after entering into the loan with WMC, Plaintiff sent a "notice of rescission" to WMC's legal counsel, Michael Mayer, in Woodland Hills, California. Plaintiff also sent a copy of the notice to WMC's corporate legal department in Salt Lake City, Utah. Plaintiff did not send the notice to Bank One.

Plaintiff has not made any payments on the loan since May 1, 2001.

STANDARDS

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

DISCUSSION

I. Plaintiff's TILA damages claim (First Claim)

An action for damages for violation of TILA must be brought within one year from the date of the occurrence of the violation. 15 U.S.C. § 1640(e). Plaintiff alleges Defendants violated TILA in numerous respects arising from the closing of Plaintiff's loan with WMC. Defendants seek summary judgment on Plaintiff's TILA damages claim on the ground that Plaintiff filed this action on April 17, 2002, more than three years after the loan was closed on August 26, 1998. The Court finds there is no issue of material fact concerning this aspect of Defendants' Motion and, therefore, the Court holds Plaintiff's claims for damages under TILA are time barred.

II. Plaintiff's TILA recission claim (First Claim)

Plaintiff also seeks to rescind her loan transaction with WMC pursuant to TILA. In a consumer credit transaction in which the creditor acquires a security interest in the borrower's principal residence, TILA allows the borrower to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the rescission forms and other information required under the statute. 15 U.S.C. § 1635(a). If the creditor fails to provide the required disclosures, the borrower's right to rescind the transaction extends for three years after the consummation of the transaction or until the property is sold, whichever occurs first. 15 U.S.C. § 1635(f). Plaintiff contends Defendants failed to provide her with the required notice of right to rescind and, therefore, her right to rescind the loan transaction extended until August 26, 2001.

Defendants, on the other hand, assert they are entitled to summary judgment as to Plaintiff's rescission claim for three reasons. First, Defendants assert Plaintiff received two copies of her right to rescind at closing. Second, Defendant Bank One contends it is entitled to summary judgment because Plaintiff failed to provide it with notice of her intent to rescind the transaction within the three-year time period. Third, Defendant Fairbanks Capital argues it cannot be held liable for any claims under TILA because it is neither a creditor nor an assignee.

A. Notice of right to rescind

Federal regulations required WMC to deliver to Plaintiff two copies of the notice of right to rescind. *See* 12 C.F.R. § 226.23(b)(1). Plaintiff contends she did not receive two copies of the required notice, and, therefore, her right to rescind extended three years beyond the date of closing until August 26, 2001.

Although the record on this point is confusing, Plaintiff admits she signed one copy of the required notice at the time of closing, and that copy was retained by Chicago Title. Directly above Plaintiff's signature on the notice is the following language: "I/We acknowledge receipt of two copies of NOTICE OF RIGHT TO CANCEL." Plaintiff also admits an unsigned copy of the notice was included in the papers she was given at closing and took home. Plaintiff, nonetheless, repeatedly denies she received two copies of the notice of right to rescind. Plaintiff does not contend she was misled by the Notice Of Right to Cancel nor that she did not understand her rescission right. Indeed, three months earlier, Plaintiff successfully rescinded a loan transaction within TILA's three-day period because she was dissatisfied with the interest rate. Plaintiff argues only that Defendants failed to satisfy the requirements of TILA because Plaintiff contends the regulations required WMC to obtain Plaintiff's signature on two copies of the notice and to allow Plaintiff to retain both signed copies.

Under the regulation, the creditor is required to "deliver

two copies of the notice of the right to rescind" to the borrower. 12 C.F.R. § 226.23(b)(1). The model notice included in Appendix H includes the statement: "Keep one copy of this notice because it contains important information about your rights." *Id.*, App. H-8. This language supports Defendants' position that the regulation is satisfied when the borrower is given two copies at closing but retains only one.

The uncontroverted evidence shows Defendant delivered two copies of the notice to Plaintiff at closing. Plaintiff retained one copy, and Chicago Title retained the other. The regulation requires nothing more. Accordingly, based on the undisputed facts, the Court concludes WMC provided Plaintiff with adequate notice of her right to rescind at closing on August 26, 1998. As a result, Plaintiff's right to rescind the transaction expired three business days later. The Court, therefore, holds Defendants are entitled to summary judgment on Plaintiff's TILA rescission claim.

III. Plaintiff's FDCPA Claim (Second Claim)

Plaintiff alleges Defendants WMC, Bank One, and Fairbanks violated 15 U.S.C. § 1692g(a)(3), (4), and (5). Plaintiff alleges as follows:

> With prior knowledge of Plaintiff's "Notice of Rescission" . . . Trustee's Notice of Sale . . . was sent on or about December 21, 2001, . . . and the purported "Notice of Trustee's Sale" sent by Northwest Trustee Services, LLC, acting as agent and trustee for Fairbanks Capital Corporation, Attorney In Fact For Bank One (sic), did not contain any statement required by 15 U.S.C. § 1692(g)(a) in subparagraphs (3), (4) and (5) thereof, which requires that a debt collector, at the time of or within five days of the initial communication with the debtor, to send the debtor statements that the alleged debt will be assumed valid unless disputed within

> thirty days, that the collector will obtain verification of the alleged debt and mail the same to the debtor if disputed within thirty days, and that the debt collector will provide the debtor with the name and address of the original creditor if requested within thirty days.

Pl.'s 1st Am. Verified Compl. ¶ 78. Plaintiff apparently contends Northwest Trustee Services, LLC, violated the FDCPA when it sent the Trustee's Notice of Sale. Northwest Trustee Services, however, is no longer a Defendant in this action.

Plaintiff also makes numerous allegations regarding Bank One's status as successor trustee, WMC's assignment of the Deed of Trust, and the status of Fairbanks. It is unclear, however, how these allegations relate to Plaintiff's FDCPA claim.

In addition, Plaintiff alleges Defendants violated various subsections of "15 U.S.C. §§ 807(10), 807(12), 808(6)(A), and 812(a)." No such statutes, however, exist. Plaintiff does not make any argument concerning these alleged statutes in her response to Defendant's Motion for Summary Judgment or her own [Cross] Motion for Summary Judgment. The Court, therefore, concludes Plaintiff has abandoned these allegations.

Plaintiff also alleges Defendants violated 15 U.S.C. § 1692g(b), which provides:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment,

> or the name and address of the original creditor, and copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

Plaintiff alleges she timely disputed her debt, but Defendants failed to obtain verification of the debt and continued their collection efforts in violation of § 1692g(b). In her Complaint, Plaintiff does not identify which of the three Defendants allegedly violated this statute nor does she identify any specific improper collection efforts other than those allegedly made by Northwest Trustee Services who, as noted, is no longer a party to this action.

Defendants contend they are entitled to summary judgment as to this claim because it arises from Plaintiff's rescission claim and Plaintiff's rescission claim fails. Defendants, however, do not cite any authority for this assertion nor do they provide any analysis.

The requirements of § 1692g(b) are triggered when a debtor disputes a debt. This Court has not found any authority to support the proposition that a debt collector is retroactively relieved from its statutory obligation because a court ultimately concludes the debtor's dispute was without merit. Absent such authority, the Court concludes Defendants are not entitled to summary judgment on the basis that the Court has rejected Plaintiff's TILA rescission claim.

Defendants Bank One and WMC also argue they are entitled to summary judgment because the FDCPA applies only to debt collectors who collect debts that are "owed or due or asserted to be owed or due another." *See* 15 U.S.C. § 1692a(6). The FDCPA, therefore, protects consumers only against those entities who collect debts for third parties. To the extent they attempted to collect Plaintiff's debt, Defendants WMC and Bank One argue they did so on their own behalf rather than on behalf of any other entity and, therefore, the FDCPA does not

apply. The record does not reflect any evidence to support Plaintiff's assertion that either Bank One or WMC attempted to collect a debt on behalf of someone else.

Accordingly, the Court concludes the FDCPA does not apply to Defendants WMC and Bank One in this case, and, therefore, they are entitled to summary judgment as to this claim. Fairbanks, however, has not established it complied with the FDCPA and, therefore, the Court concludes it is not entitled to summary judgment.

IV. Plaintiff's UTPA Claim Against WMC (Fifth Claim)

Plaintiff alleges WMC used unconscionable tactics in connection with the loan transaction in violation of the UTPA, specifically Or. Rev. Stat. § 646.607. The UTPA, however, does not apply to loan transactions. *Cullen v. Inv. Strategies, Inc.*, 139 Or. App. 119, 127 (1996)(a loan is not a "good" or a "service" for UTPA purposes). Accordingly, the Court concludes WMC is entitled to summary judgment as to Plaintiff's Fifth Claim.

V. Plaintiff's Misrepresentation Claim Against WMC (Third Claim)

In her First Amended Complaint, Plaintiff identifies the following alleged misrepresentations:

1. Closing documents for the WMC loan were dated August 21, 1998, even though the date of closing was August 26, 1998, and the escrow agent told Plaintiff the loan could not close unless Plaintiff signed the documents as dated.

2. Plaintiff was not informed of WMC's complete written closing instructions or of a fax from WMC to Chicago Title concerning the date of documents.[4] The fax letter reads:

TO ALL LOAN CLOSERS!!!!

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[4]Plaintiff's signature, however, appears on WMC's written closing instructions, which are attached to her First Amended Complaint as Exhibit R.

DO NOT UNDER ANY CIRCUMSTANCE CHANGE THE DATE OF ANY OF OUR LOAN DOCUMENTS.
IT IS COMPLETELY ACCEPTABLE FOR A BORROWER TO SIGN THEIR DOCUMENTS ON OR ANYTIME AFTER THE DATE OF THE ACTUAL DOCUMENT.
IF YOU CHANGE ANY DOCUMENT DATES, YOU MAY BE HELD RESPONSIBLE FOR ANY FEES REQUIRED TO CORRECT ANY RESULTING PROBLEMS WHICH COULD HOLD UP THE FUTURE SALE OF THIS LOAN. PLEASE **DO NOT CHANGE OUR DOCUMENT DATES!**

Plaintiff asserts she would not have entered into the loan transaction if she had known of these instructions, but she does not explain why this information was material to her decision to go forward with the loan.

3. WMC or its agents told Plaintiff that "consideration was to be paid prior to Defendant's receiving the original purported Deed of Trust, dated August 26, 1998, before delivery of said purported Deed of Trust to WMC." Plaintiff contends WMC took possession of the Deed of Trust before it paid consideration.

4. Plaintiff alleges WMC represented the Deed of Trust would include a lender, a borrower, and a trustee. Plaintiff contends a trustee was not appointed "nor was the Trustee informed of any appointment as Trustee, nor was the Trustee ever paid any consideration to act as Trustee."

5. Plaintiff alleges "at all times material during the commercial transaction with the Defendant, the mortgage was presented as a fixed rate." Plaintiff alleges she did not discover the loan actually carried an adjustable rate until December 18,

2000.

Without addressing any of these allegations specifically, WMC contends Plaintiff's misrepresentation claim is barred by Oregon's two-year statute of limitations.

> Or. Rev. Stat. § 12.110(1) provides:
> An action for . . . any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

Under Oregon law, the term "discovery" is interpreted objectively and the period of limitations, therefore, began to run when Plaintiff knew or should have known of the alleged misrepresentation. *See Mathies v. Hoeck*, 284 Or. 539, 542, 588 P.2d 1 (1978). WMC argues Plaintiff should have known of any alleged misrepresentation at the time of closing because she was given copies of her loan documents for her records. She, however, admits she failed to read them. WMC apparently contends if Plaintiff had read the closing documents, she would have discovered all of the alleged misrepresentations.

It is uncontroverted that the adjustable interest rate was disclosed in the documents Plaintiff received at closing. Although Plaintiff alleges she was not given time to read the documents at the time of closing, she also admits she did not attempt to read any of the documents even after she took them home. If she had done so, she would have discovered the loan carried an adjustable interest rate. The Court, therefore, holds Plaintiff's claim that WMC misrepresented the interest rate on her loan is time barred.

As to the other alleged misrepresentations, Plaintiff admits she never spoke with anyone at WMC before or during the closing of her loan transaction, and all representations about

the loan were made by Dave Lavalley of Financial Link. Although Plaintiff dismissed her claims against Lavalley and Financial Link, she contends WMC is responsible for Lavalley's representations because Lavalley was acting as WMC's agent. Plaintiff, however, does not offer any evidence to support her contention. Plaintiff admits Lavalley was employed by Financial Link, and she hired him to help her obtain financing. Plaintiff's conclusory allegation concerning Lavalley's status, however, is not sufficient to create a fact question. In the absence of evidence of any misrepresentation to Plaintiff by WMC or someone acting on its behalf, WMC cannot be liable for misrepresentation.

VI. Plaintiff's Unilateral Mistake Claim Against WMC (Fourth Claim)

Plaintiff alleges she was mistaken in her understanding of the terms of the loan agreement because she did not know the loan had an adjustable interest rate. Plaintiff alleges WMC "intentionally misled plaintiff and concealed the actual terms of the loan agreement from her." Plaintiff, therefore, contends the loan agreement is unenforceable, and she is entitled to rescission.

"In order to avoid a contract on account of a unilateral mistake it is necessary that there be a mistake, that the mistake is basic and known to the other party, or that the circumstances are such that the other party, as a reasonable person, should have known of the mistake." *Gardner v. Meiling*, 280 Or. 665, 675, 572 P.2d 1012 (1977). Rescission is not permitted if the mistaken party was "guilty of gross negligence in making the mistake." *Id.* at 675. Plaintiff, as the mistaken party, has the burden of proving she was not grossly negligent. *Mariah Investments, Ltd. v. McCabe*, 163 Or. App. 91, 109, 986 P.2d 1209 (1999)(Landau, J., dissenting).

WMC argues Plaintiff was grossly negligent when she failed to discover the adjustable interest rate because the rate was disclosed on at least six documents signed by Plaintiff at

closing. Plaintiff does not dispute the fact that the adjustable rate was disclosed in the documents she received at closing nor does she offer any explanation for her failure to read the documents after she left the escrow office. In addition, Plaintiff does not offer any evidence to satisfy her burden to prove her mistake was not due to her own gross negligence.

To assess whether the mistaken party was grossly negligent, the court looks "to the extent to which the correct information was readily available." *Id.* at 110. The information concerning the adjustable interest rate was in Plaintiff's possession when she walked out of the escrow office and, therefore, could not have been more readily available to Plaintiff. Accordingly, the Court concludes Plaintiff's failure to review the loan documents that clearly disclosed the facts about which Plaintiff alleges she was mistaken constitutes gross negligence, and Plaintiff is not entitled to rescission on the basis of unilateral mistake.

VII. Plaintiff's Claim for Fraudulent Alteration Against WMC(Sixth Claim)

Plaintiff repeats her allegations that WMC represented to her that the loan had a fixed interest rate, and she asserts she would not have agreed to a loan with an adjustable rate.[5] The gist of Plaintiff's Sixth Claim, however, actually appears to be her assertion that sometime between August 27, 1998, and September 4, 1998, a document titled "Adjustable Rate Rider" was added to the Deed of Trust after the loan closed. Although the Rider appears to bear Plaintiff's signature, Plaintiff denies she signed it and asserts she did not see the Rider among the closing documents.

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[5]It is unclear how these allegations are relevant to a claim for fraudulent alteration of documents. In any event, as noted, Plaintiff admits no one from WMC made any representation to her regarding the interest rate on her loan.

Defendants contend the Adjustable Rate Rider was presented to Plaintiff, signed by her during closing, and was a part of the Deed of Trust at all times. The escrow agent testified the Rider was among the loan documents signed by Plaintiff at closing. After closing, the escrow agent sent the original Deed of Trust, including the Adjustable Rate Rider, directly to Multnomah County for recording. Defendants further argue Plaintiff's allegation that she "did not see" the Rider does not create a fact question as to whether the Rider was part of the Deed of Trust because Plaintiff admits she did not read the documents that she signed at closing. Accordingly, Defendants contend Plaintiff has not presented any evidence to support her claim of "fraudulent alteration" of the Deed of Trust.

Plaintiff admits the Adjustable Rate Rider was recorded in Multnomah County together with the Deed of Trust on September 4, 1998. Although the Rider is signed "Dianna Roberts ud," Plaintiff denies this is her signature. Plaintiff admits she signed other documents during closing and placed the letters "ud" after her signature to indicate she was signing under duress because she was not given adequate time to review the documents before signing. Plaintiff alleges the Rider may have been altered by an individual with the initials "ELF" because those letters appear on some of the loan documents. Plaintiff also alleges she does not know who "ELF" is or what these letters represent. Defendant, however, has presented evidence that the letters ELF are a trademark representing Electronic Laser Forms, the company that printed the forms. Plaintiff has not presented any evidence to controvert Defendants' explanation of the ELF letters nor identified any other evidence to support her claim that the Deed of Trust was fraudulently altered by adding the Adjustable Rate Rider after

closing.[6]

In summary, the Court concludes the only evidence in the record establishes the Adjustable Rate Rider was part of the Deed of Trust at closing and at the time the loan documents were recorded. Plaintiff's assertion that she "did not see" the Rider, combined with her testimony that she did not read any of the documents presented to her at closing, does not create a fact question on this issue. In addition, the Court concludes Plaintiff has not presented any evidence from which a trier of fact could find the Deed of Trust was fraudulently altered after closing. Accordingly, the Court holds WMC is entitled to summary judgment as to this claim.

VIII. Defendants' Counterclaim for Judicial Foreclosure

Defendant Bank One asserts it is entitled to a judgment of foreclosure because it has established it is the holder of the note and the beneficiary of the Deed of Trust by assignment from WMC and Plaintiff is in default of her obligation under the Deed of Trust.

Or. Rev. Stat. § 86.710 provides a trust deed "may be foreclosed by the beneficiary as provided by law for the foreclosure of mortgages on real property." Plaintiff admits she failed to make the payments required under the Note, but she argues Bank One is not entitled to foreclosure because Bank One has not established it has any interest in the Deed of Trust.[7] Plaintiff, however, ignores evidence in the record that

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[6]Plaintiff raises several objections to Defendants' affidavits. The Court, however, finds Defendants' affidavits to be admissible and Plaintiff's objections to be without merit.

[7]Plaintiff actually argues Bank One has not established it is a "successor trustee." Bank One, however, is a beneficiary under the Deed of Trust rather than a trustee. The original trustee was Regional Trustee Services, LLC, and Northwest Regional Trustee Services, LLC, was later appointed as successor trustee.

establishes Bank One and FNBC are one and the same. The record is uncontroverted that WMC assigned its interest in the Deed of Trust to FNBC, and that FNBC currently does business as Bank One. The Court concludes Bank One, therefore, is the current beneficiary under the Deed of Trust.

Bank One, however, does not adequately set forth all of the elements necessary to establish entitlement to judicial foreclosure. Bank One's Motion contains little more than a statement that it is the holder of a Note that Plaintiff has failed to pay. Bank One does not state whether any subordinate lien claimants exist, whether any other actions to collect the debt are pending, or the status of Plaintiff's bankruptcy filing. The Court, therefore, concludes Bank One has failed to establish on this record that it is entitled to judicial foreclosure as a matter of law.

CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion for Summary Judgment (#217) and **DENIES** Plaintiff's [Cross] Motion for Summary Judgment (#229).

IT IS SO ORDERED.

DATED this 4th day of February, 2004.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

RobertsCV02-499-02-02-04.wpd

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO*, District Judge.

The panel has voted to deny the Request for Publication. Plaintiff's Request for Publication filed on March 24, 2006, is DENIED.

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* The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO*, District Judge.

The panel has voted to deny Appellant Roberts' Joint Petition for Panel Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The joint petition for panel rehearing and petition for rehearing en banc filed on March 23, 2006, is DENIED.

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* The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

15 U.S.C. § 1604. Disclosure guidelines

(a) Promulgation, contents, etc., of regulations

The Board shall prescribe regulations to carry out the purposes of this subchapter. Except in the case of a mortgage referred to in section 1602 (aa) of this title, these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(b) Model disclosure forms and clauses; publication, criteria, compliance, etc.

The Board shall publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements of this subchapter and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures. In devising such forms, the Board shall consider the use by creditors or lessors of data processing or similar automated equipment. Nothing in this subchapter may be construed to require a creditor or lessor to use any such model form or clause prescribed by the Board under this section. A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor

(1) uses any appropriate model form or clause as published by the Board, or

(2) uses any such model form or clause and changes it by

> (A) deleting any information which is not required by this subchapter, or
>
> (B) rearranging the format, if in making such deletion or

rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

(c) Procedures applicable for adoption of model forms and clauses

Model disclosure forms and clauses shall be adopted by the Board after notice duly given in the Federal Register and an opportunity for public comment in accordance with section 553 of title 5.

(d) Effective dates of regulations containing new disclosure requirements

Any regulation of the Board, or any amendment or interpretation thereof, requiring any disclosure which differs from the disclosures previously required by this part, part D, or part E of this subchapter or by any regulation of the Board promulgated thereunder shall have an effective date of that October 1 which follows by at least six months the date of promulgation, except that the Board may at its discretion take interim action by regulation, amendment, or interpretation to lengthen the period of time permitted for creditors or lessors to adjust their forms to accommodate new requirements or shorten the length of time for creditors or lessors to make such adjustments when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. Notwithstanding the previous sentence, any creditor or lessor may comply with any such newly promulgated disclosure requirements prior to the effective date of the requirements.

(f) *1 Exemption authority

(1) In general

The Board may exempt, by regulation, from all or part of this subchapter any class of transactions, other than transactions involving any mortgage described in section 1602 (aa) of this title, for which, in the determination of the Board, coverage under all

or part of this subchapter does not provide a meaningful benefit to consumers in the form of useful information or protection.

(2) Factors for consideration

n determining which classes of transactions to exempt in whole or in part under paragraph (1), the Board shall consider the following factors and publish its rationale at the time a proposed exemption is published for comment:

(A) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to the consumers who are parties to such transactions, as determined by the Board.

(B) The extent to which the requirements of this subchapter complicate, hinder, or make more expensive the credit process for the class of transactions.

(C) The status of the borrower, including——

(i) any related financial arrangements of the borrower, as determined by the Board;

(ii) the financial sophistication of the borrower relative to the type of transaction; and

(iii) the importance to the borrower of the credit, related supporting property, and coverage under this subchapter, as determined by the Board;

(D) whether the loan is secured by the principal residence of the consumer; and

(E) whether the goal of consumer protection would be undermined by such an exemption.

(g) Waiver for certain borrowers

(1) In general

The Board, by regulation, may exempt from the requirements of this subchapter certain credit transactions if——

(A) the transaction involves a consumer——

(i) with an annual earned income of more than $200,000; or

(ii) having net assets in excess of $1,000,000 at the time of the transaction; and

(B) a waiver that is handwritten, signed, and dated by the consumer is first obtained from the consumer.

(2) Adjustments by the Board

The Board, at its discretion, may adjust the annual earned income and net asset requirements of paragraph (1) for inflation.

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[1] So in original. No subsec. (e) has been enacted.

15 U.S.C. § 1635. Right of rescission as to certain transactions

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the boligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor''s

obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to——

(1) a residential mortgage transaction as defined in section 1602 (w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if

(1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction,

(2) such agency finds a violation of this section, and

(3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor

of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction; after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if——

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605 (f) of this title, and subject tothe time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does

not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer''s right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

15 U.S.C. § 1641. Liability of assignees

* * *

(c) Right of rescission by consumer unaffected

ny consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.

* * *

(f) Treatment of servicer

(1) In general

A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.

(2) Servicer not treated as owner on basis of assignment for administrative convenience

A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

(3) "Servicer" defined

or purposes of this subsection, the term "servicer" has the same meaning as in section 2605 (i)(2) of title 12.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

12 U.S.C. § 1. Office of Comptroller of the Currency

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury. The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director''s jurisdiction under section 1462a (b)(3) of this title. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency.

12 U.S.C. § 27. Certificate of authority to commence banking

(a) If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by title 62 of the Revised Statutes. A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to limited to those of a trust company and activities related thereto.

(b)

(1) The Comptroller of the Currency may also issue a certificate of authority to commence the business of banking pursuant to this section to a national banking association which is owned exclusively (except to the extent directors'' qualifying shares are required by law) by other depository institutions or depository institution holding companies and is organized to engage exclusively in providing services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a "banker's bank").

(2) Any national banking association chartered pursuant to paragraph (1) shall be subject to such rules, regulations, and orders as the Comptroller deems appropriate, and, except as

otherwise specifically provided in such rules, regulations, or orders, shall be vested with or subject to the same rights, privileges, duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the national banking laws to a national bank.

Title 12: Banks and Banking

PART 226—TRUTH IN LENDING (REGULATION Z)
Subpart B—Open-End Credit

§ 226.15 Right of rescission.

(a) *Consumer's right to rescind.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[36] whichever occurs

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[36]The term *material disclosures* means the information that must be provided to satisfy the requirements in §226.6 with regard to the method of determining the finance charge and the

last. If the required notice and materia disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in §226.36(b)). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

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balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in §226.5b(d)(5)(i) and (ii) that is required under §226.6(e)(2).

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void, and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notiee of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited, except as provided in paragraph (e)(2) of this section.

(2) The need of the consumer to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest.[36a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South.[36b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall

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[36a] A list of the affected areas will be maintained by the Board.

[36b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.

expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas. [36c] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 54 FR 24688, June 9, 1989; 58 FR 40583, July 29, 1993; 59 FR 40204, Aug. 5, 1994; 59 FR 63715, Dec. 9, 1994; 66 FR 17338, Mar. 30, 2001]

[36c] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.

Title 12: Banks and Banking

PART 226—TRUTH IN LENDING (REGULATION Z)
Subpart B—Closed-End Credit

§ 226.20 Subsequent disclosure requirements.

(a) *Refinancings.* A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:

(1) A renewal of a single payment obligation with no change in the original terms.

(2) A reduction in the annual percentage rate with a corresponding change in the payment schedule.

(3) An agreement involving a court proceeding.

(4) A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in §226.4(d).

(5) The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart.

(b) *Assumptions.* An assumption occurs when a creditor expressly agrees in writing with a subsequent consumer to accept that consumer as a primary obligor on an existing residential mortgage transaction. Before the assumption occurs, the creditor shall make new disclosures to the subsequent consumer, based on the remaining obligation. If the finance charge originally imposed on the existing obligation was an add-on or discount finance charge, the creditor need only disclose:

(1) The unpaid balance of the obligation assumed.

(2) The total charges imposed by the creditor in connection with the assumption.

(3) The information required to be disclosed under §226.18(k), (l), (m), and (n).

(4) The annual percentage rate originally imposed on the obligation.

(5) The payment schedule under §226.18(g) and the total of payments under §226.18(h) based on the remaining obligation.

(c) *Variable-rate adjustments.* [45c] An adjustment to the interest rate with or without a corresponding adjustment to the payment in a variable-rate transaction subject to §226.19(b) is an event requiring new disclosures to the consumer. At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before a payment at a new level is due, the following disclosures, as applicable, must be delivered or placed in the mail:

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[45c] Information provided in accordance with variable-rate subsequent disclosure regulations of other federal agencies may be substituted for the disclosure required by paragraph (c) of this section.

(1) The current and prior interest rates.

(2) The index values upon which the current and prior interest rates are based.

(3) The extent to which the creditor has foregone any increase in the interest rate.

(4) The contractual effects of the adjustment, including the payment due after the adjustment is made, and a statement of the loan balance.

(5) The payment, if different from that referred to in paragraph (c)(4) of this section, that would be required to fully amortize the loan at the new interest rate over the remainder of the loan term.

[46 FR 20892, Apr. 7, 1981, as amended at 52 FR 48671, Dec. 24, 1987]

§ 226.15 Right of rescission.

(a) *Consumer's right to rescind.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this

section, or delivery of all material disclosures,[36] whichever occurs last. If the required notice and material disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in §226.36(b)). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

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[36]The term *material disclosures* means the information that must be provided to satisfy the requirements in §226.6 with regard to the method of determining the finance charge and the balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in §226.5b(d)(5)(i) and (ii) that is required under §226.6(e)(2).

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void, and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited, except as provided in paragraph (e)(2) of this section.

(2) The need of the consumer to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest. [36a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South. [36b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall

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[36a] A list of the affected areas will be maintained by the Board.

[36b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.

expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas. [36e] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 54 FR 24688, June 9, 1989; 58 FR 40583, July 29, 1993; 59 FR 40204, Aug. 5, 1994; 59 FR 63715, Dec. 9, 1994; 66 FR 17338, Mar. 30, 2001]

[36e] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.

Board of Governors of the Federal Reserve System

Amendments to the Official Staff Commentary on
Regulation Z
Truth in Lending
May 2004*

Compliance with the following amendments (items 1 through 8), effective April 1, 2004, is optional until October 1, 2004.

1. *Comment 2(b)-2 is added to read as follows:*

2. *Amount.* The numerical amount must be a dollar amount unless otherwise indicated. For example, in a closed-end transaction (subpart C), the amount financed and the amount of any payment must be expressed as a dollar amount. In some cases, an amount should be expressed as a percentage. For example, in disclosures provided before the first transaction under an open-end plan (subpart B), creditors are permitted to explain how the amount of any finance charge will be determined; where a cash-advance fee (which is a finance charge) is

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* A complete commentary pamphlet, as amended effective April 1, 2004, consists of—
• the regulation pamphlet dated May 2002 (see inside front cover) and
• this slip sheet.
Items 1 through 8 are new. The other items were included in the October 2003 slip sheet.

a percentage of each cash advance, the amount of the finance charge for that fee is expressed as a percentage.

2. *Comment 15(a)(2)-1 is amended by adding two sentences at the end to read as follows:*

* * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

3. *Comment 15(d)(4)-1 is amended by adding two sentences at the end to read as follows:*

* * * The sequence of procedures under section 226.15(d)(2) and (3), or a court's modification of those procedures under section 226.15(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

4. *Comment 18(c)(1)(iii)-1 is amended in the last sentence by changing "footnote 40" to "footnote 41".*

5. *Comment 23(a)(2)-1 is amended by adding two sentences at the end to read as follows:*

* * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom

payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

* * * The sequence of procedures under section 226.23(d)(2) and (3), or a court's modification of those procedures under section 226.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

7. *The commentary on section 226.27 is amended to read as follows:*

SECTION 226.27—Language of Disclosures

1. *Subsequent disclosures.* If a creditor provides initial disclosures in a language other than English, subsequent disclosures need not be in that other language. For example, if the creditor gave Spanish-language initial disclosures, periodic statements and change-in-terms notices may be made in English.

References

Statute: None
Other sections: None
Previous regulation: § 226.6(a)
1981 changes: No substantive change

8. *Comment 32(a)(1)(ii)-1 is amended in paragraph ii to read as follows:*

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is

included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under section 226.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

9. *Effective January 1, 2003, in comment 32(a)(1)(ii)-2, paragraph viii is added, and effective January 1, 2004, paragraph ix is added to read as follows:*

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI-U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI-U from June 2002 to June 2003, rounded to the nearest whole dollar.

Compliance with the following amendments (items 10 through 14), effective April 1, 2003, is optional until October 1, 2003.

10. *Comment 6(b)-2, paragraphs ix and x, are added to read as follows:*

ix. A fee to expedite delivery of a credit card, either at account opening or during the life of the account, provided delivery of the card is also available by standard mail service (or other means at least as fast) without paying a fee for delivery

x. A fee charged for arranging a single payment on the credit account, upon the consumer's request (regardless of how frequently the consumer requests the service), if the credit plan provides that the consumer may make payments on the account by another reasonable means, such as by

standard mail service, without paying a fee to the creditor

11. *Comment 12(a)(2)-6 is amended to read as follows:*

6. *One-for-one rule—exception.* The regulation does not prohibit the card issuer from:

i. Replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E

ii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under section 226.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under section 226.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.

12. *Comment 18(g)-5 is amended to read as follows:*

5. *Mortgage insurance.* The payment schedule should reflect the consumer's mortgage insurance payments until the date on which the creditor must automatically terminate coverage under applicable law, even though the consumer may have a right to request that the insurance be cancelled earlier. The payment schedule must reflect the legal obligation, as determined by applicable state or other law. For example, assume that under applicable law, mortgage insurance must terminate after the 130th

scheduled monthly payment, and the creditor collects at closing and places in escrow two months of premiums. If, under the legal obligation, the creditor will include mortgage insurance premiums in 130 payments and refund the escrowed payments when the insurance is terminated, the payment schedule should reflect 130 premium payments. If, under the legal obligation, the creditor will apply the amount escrowed to the two final insurance payments, the payment schedule should reflect 128 monthly premium payments. (For assumptions in calculating a payment schedule that includes mortgage insurance that must be automatically terminated, see comments 17(c)(1)-8 and 17(c)(1)-10.)

13. *Comment 19(b)(1)-2 is amended by removing "comment 19(b)-4" and adding "comment 19(b)-5" in its place.*

14. *Comment 32(a)(1)(i)-4 is amended to read as follows:*

4. *Treasury securities.* To determine the yield on comparable Treasury securities for the annual percentage rate test, creditors may use the yield on actively traded issues adjusted to constant maturities published in the Board's "Selected Interest Rates" (statistical release H-15). Creditors must use the yield corresponding to the constant maturity that is closest to the loan's maturity. If the loan's maturity is exactly halfway between security maturities, the annual percentage rate on the loan should be compared with the yield for Treasury securities having the lower yield. In determining the loan's maturity, creditors may rely on the rules in section 226.17(c)(4) regarding irregular first payment periods. For example:

i. If the H-15 contains a yield for Treasury securities with constant maturities of 7 years and 10 years and no maturity in between, the annual percentage rate for an 8-year mortgage loan is compared with the yield of securities having a 7-year maturity, and the annual percentage rate for a 9-year mortgage loan is compared

with the yield of securities having a 10-year maturity.

ii. If a mortgage loan has a term of 15 years, and the H-15 contains a yield of 5.21 percent for constant maturities of 10 years, and also contains a yield of 6.33 percent for constant maturities of 20 years, then the creditor compares the annual percentage rate for a 15-year mortgage loan with the yield for constant maturities of 10 years.

iii. If a mortgage loan has a term of 30 years, and the H-15 does not contain a yield for 30-year constant maturities, but contains a yield for 20-year constant maturities, and an average yield for securities with remaining terms to maturity of 25 years and over, then the annual percentage rate on the loan is compared with the yield for 20-year constant maturities.

In

Recorded in the County of Multnomah. Oregon
C. Swick. Deputy Clerk
Tital: 5.00
2000-132848 09-25-2000 10:41:25am ATSKB
A80 1 RRF
5.00

WMC No. 10212507
Inv. Loan No.
Commit. No. WMC1998-B
Tax Parcel I.D.

Prepared By: SHERI SMART
When Recorded. Mail To:
WMC MORTGAGE CORP.
Attn: TR-59
P.O.BOX 54089
LOS ANGELES, CA 90054-9984

Note: This assignment should be kept with the Note and Deed of Trust hereby assigned.

ASSIGNMENT OF DEED OF TRUST

For Valuable Consideration, WMC MORTGAGE CORP.
P.O. BOX 54089, LOS ANGELES, CA 90054
hereby grants, assigns, and transfers to: THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT, DATED SEPTEMBER 1, 1998, WMC SERIES 1998-B, WITHOUT RECOURSE.
all beneficial interest undert hat certain Deed of Trust dated AUGUST 21, 1998 executed by DIANA ROBERTS
as Trustor, to REGIONAL TRUSTEE SERVICES CORPORATION

as Trustee, and recorded as Instrument No. 98159385, on 9-4-98, in Book ___ at Page ___ of Official Records, in the office of the Recorder of MULTNOMAH County, OREGON, together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust.
AS DESCRIBED IN DEED OF TRUST REFERRED TO HEREIN.
Being ReRecorded To Include Document Number And Recording Date
Property Address:
17930-32 NORTHEAST WASCO STREET
PORTLAND, OR 97230

WMC MORTGAGE CORP.
/S/ Lorraine Best
LORRAINE BEST, Assistant Secretary
Dated JUNE 16, 2000

State of California SS
County of Los Angeles SS

On JUNE 16, 2000, before me the undersigned, a Notary Public in and for said State, personally appeared LORRAINE BEST, Assistant Secretary, personally known to me (or proved to me on the basis of satisfactory evidence) to be the duly authorized person who executed the within instrument on behalf of the Corporation, and acknowledged to me that such Corporation executed the within instrument pursuant to Its By-laws or a Resolution of its Board of Directors.

WITNESS my hand and official seal:

/s/ Doris K. Shafer
Notary Public in and for said County and State

DORIS K. SCHAFER
Commission # 1245380
Notary Public - California
Los Angeles County
My Comm. Expires Dec 11, 2003

PROTEST FOR NON-ACCEPTANCE OF NOTICE OF DECEMBER 13, 2001, TRUSTEE'S NOTICE OF SALE AND DEED OF TRUST, RECORDED IN THE COUNTY OF MULTNOMAH, OREGON, RECORDING NUMBER 98159385 DUE TO RESCISSION OF CONTRACT.

On the 12th day of April, 2002, I, Dianna Joyce Roberts, appeared before me as a notary public for the State of Oregon and request this protest by making and proving competent evidence satisfactory to that notary public and in speaking to the notary public did dishonor the Deed of Trust along with other documents since the debt due was canceled as a result of a notice of rescission of contract filed in a timely fashion on or about August 3, 2001.

Dated: 4/12/02 /s/ Dianna Joyce Roberts
Dianna Joyce Roberts

STATE OF OREGON, County of Clackamas) ss

Acknowledged before me this 12th day of April, 2002.

(Seal) /s/ Donald R Markham
Notary Public - State of Oregon
Commission expires: 4/26/02

On the 12th day of April, in the year 2002, I, Donald R. Markham, notary public for the State of Oregon, domiciled in the County of Clackamas County, Oregon, at the request of Dianna Joyce Roberts, did exhibit and view the Notice of December 13, 2001, Trustee's Notice of Sale, Deed of Trust, recorded in the County of Multnomah, Oregon, recording number 98159385 and being the notary public of record for a

rescission of contract dated August 3, 2001 and which was duly noted for non-acceptance. Repudiation of this debt is pursuant to O.R.S. 73.0505, 73.0504, 73.050 and 194.070.

Upon competent evidence, Dianna Joyce Roberts, made available information satisfactory to Donald R. Markham, notary public for the State of Oregon to prove dishonor for the purposes of O.R.S. 73.0505 of the above debt. Attached to this protest are true copies of the instruments that are being returned pursuant to O.R.S. 73.053.

Wherefore, I, Donald R. Markham, the said notary, at the request aforesaid, have protested, and by these presents do protest against all parties of said Deed of Trust, and all other parties thereto or therein concerned, for all costs, damages and interest, presents and to come, for want of Deed of Trust due to rescission of contract.

In testimony, wherefore, I, have, on the last mentioned day and year, in the County of Clackamas, State of Oregon, signed this presentment.

/s/ Donald R Markham
Notary Public - State of Oregon
52127 SE Cherryville Drive
Sandy, Oregon 97055

ARTICLE III

ADMINISTRATION AND SERVICING OF MORTGAGE LOANS

Section 3.01. Master Servicer to Assure Servicing. (a) The Master Servicer shall take such actions as are necessary to ensure the servicing and administration of the Mortgage Loans and any REO Property in accordance with this Agreement and its normal servicing practices, which generally shall conform to the standards of an institution prudently servicing mortgage loans similar to the Mortgage Loans for its own account and shall have full authority to do anything it reasonably deems appropriate or desirable in connection with such servicing and administration. The Master Servicer may perform its responsibilities relating to servicing through other agents or independent contractors, but shall not thereby be released from any of its responsibilities as hereinafter set forth. The authority of the Master Servicer, in its capacity as Master Servicer, and any Subservicer acting on its behalf, shall include, without limitation, the power to (i) consult with and advise any Subservicer regarding administration of a related Mortgage Loan, (ii) approve any recommendation by a Subservicer to foreclose on a related Mortgage Loan, (iii) supervise the filing and collection of insurance claims and take or cause to be taken such actions on behalf of the insured Person thereunder as shall be reasonably necessary to prevent the denial of coverage thereunder, and (iv) effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing a related Mortgage Loan, including the employment of attorneys, the institution of legal proceedings, the collection of deficiency judgments, the acceptance of compromise proposals, the filing of claims under any insurance policy and any other matter pertaining to a Delinquent Mortgage Loan. The authority of the Master Servicer shall include, in addition, the power on behalf of the Certificateholders, the Trustee

or either of them to (i) execute and deliver customary consents or waivers and other instruments and documents, (ii) consent to transfer of any related Mortgaged Property and assumptions of the related Mortgage Loans (in the matter provided in this Agreement) and (iii) collect any Insurance Proceeds and Liquidation Proceeds. Without limiting the generality of the foregoing, the Master Servicer and any Subservicer acting on its behalf may, and is hereby authorized and empowered by the trustee to, execute and deliver, on behalf of itself, the Certificateholders, the Trustee or either of them, any instruments of satisfaction, cancellation, partial or full release, discharge and all other comparable instruments, with respect to the Mortgage Loan, any related insurance policies and the accounts related thereto, and the Mortgaged Properties. The Master Servicer may exercise this power in its own name or in the name of a Subservicer.

(b) Notwithstanding the provisions of Subsection 3.01(a), the Master Servicer shall not take any action adverse to the rights and interests of the Trustee or the Certificateholders under this Agreement.

(c) The Trustee shall furnish the Master Servicer with any powers of attorney and other documents in the form provided by it which are necessary or appropriate to enable the Master Servicer to service and administer the relatec Mortgage Loans and REO Property.

APPOINTMENT OF SUCCESSOR TRUSTEE

Servicer Loan No. 1102125075

KNOW ALL MEN BY THESE PRESENTS, that Dianna Roberts, as grantors, and Regional Trustee Services Corporation, as the trustee, and WMC Mortgage Corp., is the beneficiary under that certain trust deed dated 08/21/98, and recorded 09/04/98, as 98159385 of the Mortgage Records of Multnomah County, Oregon. The undersigned, who is the present beneficiary under said trust deed desires to appoint anew trustee in the place and stead of the original trustee named above;

NOW THEREFORE, in view of the premises, the undersigned hereby appoints Northwest Trustee Services, LLC, whose address is P.O. Box 4143, Bellevue, WA 98009-4143 as successor trustee under said trust deed, to have all the powers of said original trustee, effective immediately.

In construing this instrument, and whenever the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the undersigned beneficiary has executed this document. If the undersigned is a corporation, it has caused its name to be signed and its seal affixed by an officer or other person duly authorized to do so by its board of trustees.

Fairbanks Capital Corp.
Attorney In Fact For

By: [scribble]
Typed Name: ____
Title: _____

[stamp:]Kristen Varnedoe
Assistant Secretary
Document Control

State of Utah
County of Salt Lake

This instrument was acknowledged before me on 7-9-01 by Kristen Varnedoe as Assistant Secretary Fairbanks Capital Corp.

/s/ Mendi N. Aragon
Notary Signature
My commission expires: _____

[seal] **NOTARY PUBLIC**
MENDI N. ARAGON
136 So Main Ste 500
Salt Lake City, UT 84101
My Commission Expires
March 13th, 2002
STATE OF UTAH

APPOINTMENT OF SUCCESSOR TRUSTEE
RE: Trust Deed from
Roberts, Dianna
Grantor
to
Northwest Trustee Services, LLC
Trustee File No. 7006.20536

After recording return to:
Kathy Taggart
Northwest Trustee Services, LLC
PO Box 4143
BELLEVUE, WA 98009-4143

* * *

3. Defendant objects to the use of "you," "your," and "Bank One, N.A." in the Interrogatories to the extent it includes "any of its past or present parents, related companies, affiliates, divisions, business units, departments, insurers, agents, ... attorneys, investigators" on the grounds that such definition renders the Interrogatories overbroad, unduly burdensome, oppressive, and vague and ambiguous; seeks information outside Defendant's possession, custody or control; and calls for the production of information protected by the attorney-client privilege and the attorney work product doctrine.

4. Defendant objects to the definition of "WMC" in the Interrogatories to the extent it includes "subsidiaries, affiliates, parent corporations, successors," and "directors,... agents, servants, and persons acting on its behalf" on the grounds that such definition renders the Interrogatories overbroad, unduly burdensome, oppressive, and vague and ambiguous; seeks information outside Defendant's possession, custody or control; and calls for the production of information protected by the attorney-client privilege and the attorney work product doctrine.

* * *

PRESTON GATES & ELLIS LLP
222 SW COLUMBIA STREET
SUITE 1400
PORTLAND, OR 97201-6632
TELEPHONE (503) 228-3200

* * *

INTERROGATORY NO. 10: Was Fairbanks Capital Corporation ever appointed attorney in fact for Bank One, N.A., as it relates to plaintiff's debt which is the basis of this legal action.

RESPONSE: On information and belief, Bank One, N.A. never appointed Fairbanks Capital Corporation attorney in fact as it relates to plaintiff's debt.

* * *

K:\37321\00006\LJ\LJ__P23AD

PRESTON GATES & ELLIS LLP
222 SW COLUMBIA STREET
SUITE 1400
PORTLAND, OR 97201-6632
TELEPHONE (503) 228-3200

1s

WMC SECURED ASSETS CORP.,
Company,

WMC MORTGAGE CORP.,
Master Servicer,

and

THE FIRST NATIONAL BANK OF CHICAGO,
Trustee

POOLING AND SERVICING AGREEMENT
Dated as of September 1, 1998

Mortgage Pass-Through Certificates
Series 1998-B

[TPW: NY01:672561.5] 18305-00013 09/06/98 07:42PM

65.

Copies of the protest were sent to all parties and/or agents having and/or showing an interest in the Deed of Trust. Notices were sent to Northwest Trustee Services, LLC., WMC, Bank One, Regional Trustee Services Corporation, Nationwide Process Service. Inc., Routh, Crabtree, Fennell, and Loan Services Center, a.k.a Fairbanks Capital.

66.

To date no party or agent has responded to the notice of protest.

69.

A Notice of Rescission by the Plaintiff to Master Service and/or Subservicer would under the terms of the Pooling and Serving Agreement be delivered to the Trustee of said agreement.

(iii) The Company is not required to obtain the consent of any other Person or any consent, license, approval or authorization from, or registration or declaration with, any governmental authority, bureau or agency in connection with the execution, delivery, performance, validity or enforceability of this Agreement, except for such consent, license, approval or authorization, or registration or declaration, as shall have been obtained or filed, as the case may be;

(iv) The execution and delivery of this Agreement and the performance of the transactions contemplated hereby by the Company will not violate any provision of any existing law or regulation or any order or decree of any court applicable to the Company or any provision of the certificate of incorporation or bylaws of the Company, or constitute a material breach of any mortgage, indenture, contract or other agreement to which the Company is a party or by which the Company may be bound; and

(v) No litigation or administrative proceeding of or before any court, tribunal or governmental body is currently pending, or to the knowledge of the Company threatened, against the Company or any of its properties or with respect to this Agreement which, to the knowledge of the Company, has a reasonable likelihood of resulting in a material adverse effect on the transactions contemplated by this Agreement.

Section 2.04. Enforcement of Representations and Warranties. The Master Servicer, on behalf of and subject to the direction of the Trustee, shall enforce the representations and warranties and related obligations for breaches thereof of the Seller pursuant to the Mortgage Loan Purchase Agreement. Upon the discovery by the Seller, the Master Servicer, the Trustee or the Company of a breach of any of the representations and warranties made in the Mortgage Loan Purchase Agreement in respect of any

Mortgage Loan, which materially and adversely affects the interests of the Certificateholders in such Mortgage Loan, the party discovering such breach shall give prompt written notice to the other parties. The Master Servicer shall promptly notify the Seller of such breach and request that, pursuant to the terms of the Mortgage Loan Purchase Agreement, the Seller either cure such breach in all material respects or purchase such Mortgage Loan within 90 days from the date the Seller was notified of such breach, in each instance in accordance with the Mortgage Loan Purchase Agreement; provided that the Seller shall, subject to the conditions set forth in the Mortgage Loan Purchase Agreement, have the option to substitute a Qualified Substitute Mortgage Loan or Qualified Substitute Mortgage Loans for such Mortgage Loan if such substitution occurs within two years following the Closing Date; provided that if the omission or defect would cause the Mortgage Loan to be other than a "qualified mortgage" as defined in Section 860G(a)(3) of the Code, any such cure or repurchase must occur within 90 days from the date such breach was discovered. Monthly Payments due with respect to Qualified Substitute Mortgage Loans in the month of substitution shall not be part of the Trust Fund and shall be retained by the Master Servicer and remitted by the MS to the Seller on the next succeeding Distribution Date. For the month of substitution, remittance to the Distribution Account pursuant to this Agreement shall include the Monthly Payment received on a Deleted Mortgage Loan for such month, and thereafter the Seller shall be entitled to retain all amounts received in respect of such Deleted Mortgage Loan. The Master Servicer

7): On what date did WMC receive the "Valuable Consideration" from The First National Bank of Chicago, as Trustee under the Pooling and Servicing Agreement, dated September 1, 1998, WMC Series 1998-B, Without Recourse, as stated in the "Assignment of Deed of Trust," attached is a copy of said assignment and marked Exhibit C.

RESPONSE: WMC did not receive any consideration from FNBC. Any consideration would have been provided at the time the loan on the subject property was transferred to the asset pool and would have been provided by the company forming the pool, WMC Secured Assets Corp. This date is believed to be September 1, 1998 or shortly thereafter.

DATED: July 8, 2003.

By: /s/ Linda Johannsen
John E. Kennedy, OSB #98269
Linda Johannsen, OSB #90306
(503) 228-3200
Attorneys for Plaintiff WMC Mortgage Corporation and Bank One, N.A.

2): On what date did the trustee or successor trustee under the Pooling and Servicing Agreement provide the "Valuable Consideration" to WMC as stated in the Assignment of Deed of Trust, a true copy attached and marked Exhibit A?

RESPONSE: The trustee did not provide the "Valuable Consideration" to WMC. This date is believed to be September 1, 1998 or shortly thereafter.

DATED: July 8, 2003.

By: /s/ Linda Johannsen
John E. Kennedy, OSB #98269
Linda Johannsen, OSB #90306
(503) 228-3200
Attorneys for Plaintiff WMC Mortgage Corporation and Bank One, N.A.

Comptroller of the Currency

TREASURY DEPARTMENT OF THE UNITED STATES

Washington, D.C.

Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that ***The First National Bank of Chicago*** located in ***Chicago***, State of ***Illinois***, has complied with all provisions of the statutes of the United States required to be complied with before being authorized to commence the business of banking as a National Banking Association;

Now, therefore, I hereby certify that the above-named association is authorized to commence the business of banking as a National Banking Association under the title ***Bank One, National Association*** effective ***the thirteenth day of September 1999***.

(Seal)

In testimony whereof, witness my signature and seal of office this *thirteenth* day of *September 1999*.

/s/ John D. Hawke, Jr.
Comptroller of the Currency

Charter No. 8, originally issued on the twenty-second day of June 1863.

15 U.S.C. § 1602. Definitions and rules of construction

* * *

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purpose of the requirements imposed under part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans. Any person who originates 2 or more mortgages referred to in subsection (aa) of this section in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this subchapter.

(3)

No. 06-249

FILED
SEP 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DIANNA ROBERTS,
Petitioner,

v.

WMC MORTGAGE CORPORATION; BANK ONE, N.A.; FAIRBANKS CAPITAL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The trial court granted summary judgment to Respondents on Petitioner's claim for rescission under the Truth in Lending Act ("TILA"). Petitioner's appeal to the Ninth Circuit Court of Appeals asserted certain issues in her Statement of Issues and Amended Statement of Issues. Petitioner later raised additional new issues in her Reply Brief and raised even more issues in her Joint Petition for Panel Rehearing and Petition for Rehearing en Banc. Notwithstanding the numerous issues raised at various points in this case, one fact is not disputed--Petitioner never gave notice to Bank One, N.A., the successor by merger to First National Bank of Chicago, that she was seeking to rescind her loan, until she filed her lawsuit three years and eight months after the loan transaction closed. (Pet. at 23-24)

The Ninth Circuit Court of Appeals held that the district court lacked subject matter jurisdiction over the TILA rescission claim because Petitioner failed to deliver a notice of rescission to Bank One, the current beneficiary of the Deed of Trust, within TILA's three-year limitations period. (Pet. App. 2a). The court ordered the case dismissed. With respect to the claim for rescission, the only decision made by the Ninth Circuit was the decision on subject matter jurisdiction. All of the other issues raised by Petitioner were not expressly ruled on. Based on the Ninth Circuit's ruling, the only question is:

1. Whether the Ninth Circuit correctly applied the law as stated in its decision in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002), *cert. denied sub nom., Miguel v. Bank of New York Trustee, under Pooling & Servicing Agreement Series 1995 B*, 539 U.S. 927, 123 S. Ct.

2577, 156 L.Ed. 2d 604 (2003), that the consumer's right to rescind expires if notice is not delivered to the beneficial interest holder of the Deed of Trust within three years after the consummation of the loan transaction.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents include the following entities, including their predecessors:

1. WMC Mortgage Corp. ("WMC"), formerly known as Weyerhaeuser Mortgage Company, is a privately held California corporation that was incorporated in 1955. WMC is a wholly-owned subsidiary of WMC Finance Co., a Delaware corporation, which is a wholly-owned subsidiary of GE Capital Corporation.

2. JPMorgan Chase Bank, N.A. ("JPMorgan"), successor by merger to Bank One, N.A., which in turn was the successor by merger to First National Bank of Chicago, is a national banking association chartered and regulated by the federal Office of the Comptroller of the Currency. Pursuant to application, on or about October 13, 2004, the Office of the Comptroller of the Currency approved (a) the conversion of JPMorgan Chase Bank (a New York chartered bank) into a national banking association, and (b) the merger of two separate national banks, Bank One, N.A., Chicago, Illinois, and Bank One, N.A., Columbus, Ohio, with and into JPMorgan. JPMorgan is a wholly owned subsidiary of JPMorgan Chase & Co., which is incorporated under the laws of the State of Delaware with its principal place of business in New York, New York. The stock of JPMorgan Chase & Co. is publicly traded on the New York Stock Exchange under the symbol "JPM."

3. Select Portfolio Servicing, Inc. ("SPS"), formerly known as Fairbanks Capital Corp., is a Utah corporation that is a wholly owned subsidiary of SPS Holding Corp. ("SPSHC"),

a Delaware corporation formerly known as Fairbanks Capital Holding Corp. Since October 4, 2005, 100% of the outstanding shares of SPSHC have been owned by Credit Suisse First Boston (USA), Inc. ("CSFB").

TABLE OF CONTENTS

Counterstatement of the Questions Presented i

Corporate Disclosure Statement iii

Table of Contents v

Table of Authorities vii

Jurisdiction 1

Statement of the Case . . . . . .

Reasons for Denying the Petition 3

I. There is No Conflict Among the Circuit Courts over the Meaning of the Term "Creditor." 3

II. Petitioner's Argument that the TILA does not Require Notice to the Assignee is not Supported by the Statute and Violates Due Process 5

III. Petitioner Failed to Raise the Issue of Errors on the Assignment Before the Trial Court and Such Arguments are Therefore Waived 8

A. The Assignment is Not Flawed or Unenforceable 8

B. The Uniform Commercial Code does not Apply to Real Property Security Interests . . . 9

C. The Notarial Protest has No Legal Force or Effect 9

IV. Petitioner Failed to Raise or Preserve any Argument Concerning the Bank's Existence . . . 11

V. Arguments Regarding Equitable Tolling and/or Estoppel were Not Preserved or were Waived . . 11

VI. Arguments Regarding the Pooling and Servicing Agreement were Never Properly Raised and Preserved 12

Conclusion 13

TABLE OF AUTHORITIES

Cases

Beach v. Ocwen Federal Bank,
523 U.S. 410, 118 S. Ct. 1408,
140 L.Ed. 2d 566 (1998) 1, 6, 11, 12

Ellis v. General Motors Acceptance Corp.,
160 F.3d 703 (11th Cir. 1998) 3, 4

Miguel v. Country Funding Corp.,
309 F.3d 1161 (9th Cir. 2002), *cert. denied sub nom.*,
Miguel v. Bank of New York Trustee, under Pooling
& Servicing Agreement Series 1995 B, 539 U.S. 927,
123 S. Ct. 2577, 156 L.Ed. 2d 604 (2003) 2, 6

Riviere v. Banner Chevrolet, Inc.,
184 F.3d 457 (5th Cir. 1999) 4, 5

Taylor v. Quality Hyundai, Inc.,
150 F.3d 689 (7th Cir. 1998),
cert. denied 525 U.S. 1141, 119 S. Ct. 1032,
143 L.Ed. 2d 41 (1999) 4

Ticor Title Ins. Co. v. Brown,
511 U.S. 117, 114 S. Ct. 1359 (1994) 8

Statutes and Code

ORS § 73.0504(a) 9

ORS § 79.0109(4)(k) 9

ORS § 86.705 *et seq* 9

ORS § 93.600 8

ORS § 93.710(1) 9

UCC § 3-504(a) 9, 10

15 U.S.C. § 1602(f) 5

15 U.S.C. § 1635(a) 1

15 U.S.C. § 1635(b) 7

15 U.S.C. § 1635(c) 6

15 U.S.C. § 1635(f) 1, 6, 11, 12

15 U.S.C. § 1635(h) 7

15 U.S.C. § 1641 . . . . . 3, 6

15 U.S.C. § 1641(a) 4, 7

15 U.S.C. § 1641(c) 6

15 U.S.C. § 1641(e) 7

Regulations

12 CFR § 226.23(a)(3) 1

12 CFR § 226.23(d) 7

Rule

Sup. Ct. R. 10 3

Other Authority

J. White & R. Summers, Uniform Commercial Code §16-9 (4th ed. West Pub. 1995) 10

JURISDICTION

Respondents believe that the correct date that the Ninth Circuit denied Petitioner's joint petition for rehearing and petition for rehearing en banc was May 24, 2006, not July 22, 1999. Otherwise, Respondents agree with the statement of jurisdiction.

STATEMENT OF THE CASE

This case is a simple dispute over whether Petitioner was required to give notice to the assignee of the Deed of Trust on her personal residence within the three-year statute of limitations of 15 U.S.C. § 1635(f) that she asserted a right to rescind the loan transaction. There is no dispute that Petitioner did not give notice to the assignee—Bank One. (Pet. at 23-24) Notice was delivered to Bank One only when this lawsuit was filed and the summons served—more than eight months after the statute of limitations expired. The outcome of this case will not affect any other parties and is based solely on the facts of this individual case.

Under the Truth in Lending Act (the "TILA"), the obligor's right to rescind is supposed to last for three business days from the date of consummation of the loan. 15 U.S.C. § 1635(a). The rescission period can be extended for up to three years if the consumer does not receive a notice of her right to rescind or the proper disclosures at the loan closing. *Id.* § 1635(f); 12 C.F.R. § 226.23(a)(3). This Court has held that the consumer's rescission right under TILA § 1635(a) cannot be exercised, defensively or otherwise, after the three year period of § 1635(f) has run. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998).

In her complaint, Petitioner alleges that she never received two copies of the notice of her right to rescind, which she argues extended the statute of limitations to three years. Petitioner does not challenge the accuracy of the required disclosures. The parties filed cross motions for summary judgment. The trial court found that Petitioner received the notice of her right to rescind because a signed acknowledgement was included in the closing escrow officer's file. (Pet. App. 8c) Petitioner appealed this finding to the Ninth Circuit. (Pet. App. 2a)

On appeal, Respondents argued that the court lacked subject matter jurisdiction over the rescission claim under the Ninth Circuit's decision in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). The Ninth Circuit held in *Miguel* that the consumer must deliver notice of her intention to rescind to the present holder of the note and Deed of Trust within the three-year rescission period. *Id.* If the notice is not delivered, the court is deprived of subject matter jurisdiction. *Id.*

It is undisputed among the parties that the consummation of the transaction occurred on August 26, 1998. The outside limit of Petitioner's rescission right was August 26, 2001. It is undisputed that notice was not delivered to Bank One on or before August 26, 2001. The decision of the Ninth Circuit applies the law as interpreted in its prior cases and on which this Court has denied review. The only issue to consider is whether the Ninth Circuit correctly applied the statute to the facts and dismissed the case for lack of subject matter jurisdiction. Contrary to Petitioner's argument, there are no conflicting decisions in other circuits. Furthermore, the Ninth Circuit never ruled on Petitioner's arguments about the definition of "creditor," the alleged errors on the assignment, the authority of the bank to conduct business, equitable tolling

or estoppel, or the interpretation of the Pooling and Servicing Agreement. The Court should deny the Petition because the case does not qualify for or otherwise merit review in this Court.

REASONS FOR DENYING THE PETITION

Petitioner states that the Ninth Circuit changed the meaning of the term "creditor" affecting who must be served with a notice of a consumer's election to rescind under 15 U.S.C. §§ 1635 and 1641 and Regulation Z. (Pet. at 8) She states that the Ninth Circuit is in conflict with the Fifth, Seventh, and Eleventh Circuits.

Notwithstanding Petitioner's repeated statements to the contrary, the decisions cited by Petitioner do not represent conflicts among the circuits. In addition, the only asserted errors are allegations of errors in factual findings, Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

1. *There is No Conflict Among the Circuit Courts over the Meaning of the Term "Creditor."*

Petitioner requests that this Court resolve the conflict among the circuits over the meaning of the term "creditor." (Pet. at 8) There is no conflict among the circuits to resolve. Petitioner cites three cases in support of her conclusion that the circuit courts are split on the interpretation of the term "creditor." Petitioner has misread the cited cases.

In *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998), the consumer sued only the assignee of the contract and did not join the original creditor. The

Eleventh Circuit held that, pursuant to 15 U.S.C. § 1641(a), an assignee could not be held liable for an alleged disclosure violation under the TILA because the defect, if one existed, was not apparent on the face of the document. The *Ellis* decision is simply an application of § 1641(a) to the facts of the case. This decision does not represent a conflict with the Ninth Circuit.

In *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998), *cert. denied* 525 U.S. 1141, 119 S. Ct. 1032, 143 L.Ed. 2d 41 (1999), two consumers sued the assignees of car purchase contracts for violations of the TILA, claiming that the failure to disclose the fact that the dealer did not pay all of the money collected on an extended warranty to the party providing the warranty caused damage. The Seventh Circuit held that § 1641(a) of the TILA bars the plaintiffs' claims against the assignee because the alleged defect is not apparent on the face of the documents. As in *Ellis*, this is simply an application of the statute to the facts of the case. The Seventh Circuit did not discuss or consider the interpretation of the term "creditor" under the TILA in *Taylor*.

In *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457 (5th Cir. 1999), consumers purchased a new vehicle from defendant Banner Chevrolet ("Banner") on a retail installment contract that was immediately assigned to General Motors Acceptance Corp. ("GMAC"). The consumers later sued Banner for alleged violations of the TILA, although the exact claim is not explained in the opinion. At trial, the district court held that Banner was not a "creditor" within the meaning of the TILA because the contract was assigned to GMAC. The Fifth Circuit reversed and remanded the case. The Fifth Circuit found that "[b]ecause the obligation is initially payable on its face to [Banner], [Banner] is the only creditor in the transaction." *Id.* at 460. The court arrived at

this decision by interpreting the facts consistently with the Federal Reserve Board's staff interpretation and the statute itself.

Of the cases cited by Petitioner as evidencing a split among the circuits, *Riviere* is the only case interpreting the term "creditor." In *Riviere*, the Fifth Circuit interpreted the term "creditor" consistently with the Ninth Circuit's decision in this matter. The "creditor" is the party to whom the obligation is initially payable; the assignee is not the creditor. In this case, WMC Mortgage Corp. was the "creditor" and Bank One was the assignee that did not receive notice of Petitioner's attempt to rescind her mortgage loan within three years of the loan closing.

The Ninth Circuit's decision in this case is in accord with the Fifth Circuit's decision in *Riviere*. The Seventh Circuit case and the Eleventh Circuit case cited by Petitioner are not on point. The Court should deny the Petition because there is no split among the circuit courts and Petitioner has failed to raise a compelling reason to grant the Petition.

II. *Petitioner's Argument that the TILA does not Require Notice to the Assignee is not Supported by the Statute and Violates Due Process.*

Petitioner argues that there is no requirement to deliver notice to an assignee that the consumer is electing to rescind the loan transaction. (Pet. at 14-15) Petitioner argues that delivery of the notice to the original creditor is all that is required because "creditor" is defined in 15 U.S.C. § 1602(f) as the original creditor.

Viewed in context of the TILA, the right to rescind is intended to be a three business day process, so it is logical

that Congress has not adopted separate provisions for assignees. However, the Court should look at the entire statutory scheme of the TILA to determine Congress's intent regarding rescission rights and parties entitled to notice.

Section 1641(c) provides that "[a]ny consumer who has the right to rescind a transaction under section 1635 * * * may rescind the transaction as against any assignee of the obligation." Assuming that Petitioner's right to rescind was extended to three years, there is nothing in the statute that implies that she was not required to deliver notice of her election to rescind to the assignee. The statute simply authorizes the consumer to rescind against an assignee. Where, as here, the right to rescind under § 1635(f) has been extinguished before notice is delivered to the assignee, the right no longer exists. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002), *cert. denied sub nom.*, *Miguel v. Bank of New York Trustee, under Pooling & Servicing Agreement Series 1995 B*, 539 U.S. 927, 123 S. Ct. 2577, 156 L.Ed. 2d 604 (2003).

Congress differentiated between the original creditor and an assignee by providing a narrower scope of liability for assignees in 15 U.S.C. § 1641. Congress expressly provided that an assignee can be subject to the consumer's right of rescission, 15 U.S.C. § 1635(c), but

> [a]n obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable

> written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

15 U.S.C. § 1635(h). It is clear that a consumer's rescission rights are not as broad against an assignee compared to the rights against the original creditor. It is illogical to assume that the assignee is not entitled to any notice that the consumer intends to exercise the right.

Congress also restricted the consumer's ability to recover damages in a civil action against an assignee to those cases where disclosure violations were "material" or the required form was not provided. 15 U.S.C. § 1641(a). In cases where the obligation is secured by real property, an action for damages may be maintained only if the violation of the disclosure requirement is apparent on the face of the disclosure statement and the assignment is voluntary. 15 U.S.C. § 1641(e). In this respect, Congress has clearly provided for different treatment of the original creditor from an assignee. It follows that Congress did not intend that an assignee would be treated the same as the original creditor for purposes of the consumer's exercise of his or her right to rescind.

Petitioner admits that she never delivered notice to Bank One, the beneficial interest holder of record for her trust deed as of August 26, 2001 before the rescission period expired. (Pet. at 23-24) Without notice, Bank One is allegedly required to relinquish its security interest in the real property and disgorge all monies paid by Petitioner. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d). Before such a harsh remedy should be applied, an assignee of record is entitled to due process in the form of actual notice that the claim has

been asserted. The Court should bear in mind that the assignment to Bank One's predecessor was recorded approximately one year before Petitioner delivered her notice. Petitioner claims that she did not find the assignment, but the document is a matter of public record. Even if Petitioner did search and failed to find the assignment, it shows that the only questions involve evidence and facts, which is not a compelling reason for review by this Court. The Court should deny the Petition.

III. *Petitioner Failed to Raise the Issue of Errors on the Assignment Before the Trial Court and Such Arguments are Therefore Waived.*

A. The Assignment is Not Flawed or Unenforceable.

Petitioner argues that the Ninth Circuit erred when it accepted an assignment without the correct spelling of her first name and without an address for the assignee. (Pet. at 15-19) This Court does not grant a petition to correct an error of the circuit court. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S. Ct. 1359, 1362 (1994).

Oregon's system of recordation relies primarily upon the legal description of the real property. So long as a document describes the real property by giving either (a) the subdivision with boundaries, lots, blocks, addition names, or (b) partition plat recording and parcel numbers, or (c) the boundaries by metes and bounds, or (d) by reference to the book, document number or fee number of any public record, the document may be recorded. ORS 93.600 (emphasis added). The assignment in question was acknowledged by a notary and referenced the instrument number and date of the Deed of

Trust that was assigned. (Pet. App. 2n) That is all that is required under Oregon law. ORS 93.710(1).

Petitioner does not allege that she gave notice to First National Bank of Chicago ("FNBC"), the assignee of record when she decided to rescind. It makes no difference if her first name is spelled incorrectly on the assignment or if the address for FNBC was omitted. She did not find the assignment and thus, did not attempt to give notice to FNBC or its successor by merger, Bank One.

Even if the assignment is flawed, which Respondents deny, an error by the court of appeals does not provide a compelling reason to grant the Petition.

B. The Uniform Commercial Code does not Apply to Real Property Security Interests.

Petitioner argues at some length about the Uniform Commercial Code ("UCC") and perfection of instruments through possession. (Pet. at 16) Article 9 of the UCC does not apply to "the creation or transfer of an interest in or lien on real property . . . ." ORS 79.0109(4)(k). Conveyances of real property are governed by ORS Chapter 93. Security interests in real property in the form of a Deed of Trust are governed by ORS Chapter 86, in particular ORS 86.705 *et. seq*. Thus, Petitioner's arguments about possession of the instrument and the UCC are not relevant.

C. The Notarial Protest has No Legal Force or Effect.

Petitioner makes an argument about her "presentment of notice of dishonor" under UCC § 3-504(a); ORS 73.0504(a). (Pet. at 16 & 23) Article 3 of the UCC applies to negotiable

instruments such as checks. It has nothing to do with security interests in real property. The cited statute has to do with whether a party is excused from making a demand for payment after a negotiable instrument is dishonored, i.e. the check bounced. As explained by Professors White and Summers:

> [Section] 3-504(a) excuses lapses in presentment [demand for payment] where the person "cannot with reasonable diligence make presentment," where the maker or acceptor has repudiated his obligation to pay or is dead or insolvent, where the instrument specifies that presentment is not necessary, where the drawer or indorser has waived presentment "or otherwise has no reason to expect or right to require that the instrument be paid or accepted," or where "the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft."

J. White & R. Summers, Uniform Commercial Code §16-9 at 101 (4th ed. West Pub. 1995).

Petitioner claims that she exercised her remedy under Oregon law and had a "notarial protest" created and delivered. (Pet. at 16 & 23) The "notarial protest" is appended to Petitioner's brief as Appendix O. It purports to repudiate the debt of Petitioner based on the notary's review of the documents. It appears that the notary has appointed himself the fact finder based on his license as a notary to decide that Petitioner rescinded her Deed of Trust.

There is no legal basis for this document, and both the document and the argument should be disregarded by the

Court. In addition, Petitioner failed to preserve any issue regarding this argument and it is therefore waived.

IV. *Petitioner Failed to Raise or Preserve any Argument Concerning the Bank's Existence.*

The entire argument concerning First National Bank of Chicago ("FNBC") and Bank One should be disregarded. Petitioner has known since the lawsuit was filed in April 2002 that Bank One was the successor to FNBC through a merger. Plaintiff never raised this issue to the trial court or the court of appeals. The issue, to the extent an issue exists, was waived by Petitioner failing to raise it below.

V. *Arguments Regarding Equitable Tolling and/or Estoppel were Not Preserved or were Waived.*

Petitioner argues that the Ninth Circuit erred by not accepting her arguments that the statute of limitations under the TILA should be equitably tolled or that Bank One should be equitably estopped from denying her claim on the basis of the expiration of the statute of limitations. (Pet. at 21-26) Petitioner argues that this Court can toll the running of the statute of limitations under principles of equity if the application of the statute is unfair. (Pet. at 21)

This Court has held that the TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998). The issue in *Beach* concerned the consumers' attempt to use their right to rescind defensively against the lender in a judicial foreclosure action brought six years later. The consumers argued that the rescission right could be used defensively as a setoff or recoupment claim to the foreclosure

action even though brought after a statute of limitations expired. This Court held that the plain language of § 1635(f) extinguishes the consumer's right to rescind rather than simply compels the consumer to bring an action within three years.

Applying this Court's analysis in *Beach* to this case, the statute of limitations in § 1635(f) extinguished Petitioner's right to rescind against Bank One because notice was not delivered within three years. The Court should decline Petitioner's invitation to extend that right by equitably tolling the statute. There is nothing in the record that provides a basis for this relief against Bank One.

VI. *Arguments Regarding the Pooling and Servicing Agreement were Never Properly Raised and Preserved.*

Petitioner makes numerous statements based upon her interpretation of the Pooling and Servicing Agreement. (Pet. at 26-30) She has included only five pages (Appendices P, S and U) of the document.

The Pooling and Servicing Agreement was provided to Petitioner in discovery. If Petitioner wanted to argue issues regarding the Pooling and Servicing Agreement, the entire agreement should have been submitted to the trial court in the first instance. As noted by the trial court, "[t]he significance of the Pooling and Servicing Agreement is * * * unclear because only parts of the Agreement are in the record, and none of the parties explains the function of the document or its relevance to Plaintiff's claims." (Pet. App. 5c) Petitioner did not appeal this finding. Petitioner now includes select portions of the agreement for this Court to consider. The arguments or issues regarding the Pooling and Servicing

Agreement were not preserved or raised below and are waived.

CONCLUSION

Petitioner has not established a compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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